Supreme Court, U.S.
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In the

Supreme Court of the United States of America

Allan Hawkins, Petitioner

vs.

Texas Commission for Lawyer Discipline,

Respondent.

On Writ of Certiorari to the Court of Appeals

Eighth District of Texas, El Paso, Texas

Petition for Writ of Certiori

Allan Hawkins, pro se
Petitioner
PMB #147
3370 N. Hayden Road #123
Scottsdale, Arizona 85251
602-770-5906

SSPP

Questions Presented for Review

1. Whether a Texas county court may require a lawyer who does not practice criminal law, and is not competent to practice criminal law, to pay cash to a private local association to avoid being compelled to represent indigent criminal defendants.

2. Whether a Texas trial court which does not have authority to regulate the practice of law may compel one lawyer to give free legal services to clients selected by a private local association when no other Texas lawyer is required to provide any free legal services whatsoever.

3. Whether a lawyer who refuses to pay cash to a private local association and refuses to accept employment in a matter for which he is not competent, may be required to practice law, to practice law in a particular county or particular state, to practice a particular type of law; to pay a fine; or to retain a law license in a particular state.

4. Whether quasi-criminal due process is constitutionally required in state proceedings to punish lawyers, as this court mandated in *In re Ruffalo*.

5. Whether a lawyer may be punished without notice of the charges and strict construction of the law and rules in accordance with the quasi-criminal standards of *In re Ruffalo* and its progeny.

6. Whether the rules applied by the courts below are unconstitutionally vague as written or as applied.

7. Whether a lawyer who refuses to represent a defendant in a criminal case has an attorney-client

relationship with the defendant whom the lawyer refused to represent.

8. Whether, if a criminal defendant is indigent, a county judge may nullify the prohibition against a lawyer accepting representation which the lawyer knows is beyond the lawyer's competence.

9. Whether a lawyer who refuses to accept the representation of a defendant in a criminal case is the defendant's lawyer if the lawyer does not seek and obtain court permission to withdraw from the representation which the lawyer never accepted.

10. Whether the refusal of a lawyer to represent of a defendant in a criminal case thereby violates rule 1.01 of the Texas Disciplinary Rules of Professional Conduct.

11. Whether a lawyer who refuses to represent a defendant in a criminal case thereby violates rule 1.15 of the Texas Disciplinary Rule of Professional Conduct.

12. Whether a district court in Texas has jurisdiction to hear a lawyer disciplinary complaint other than to hear *de novo* a *complaint* filed with the State Bar of Texas for which *just cause was* found by an investigatory panel.

13. Whether an final judgment which recites that it was signed as an agreed judgment, but which was not agreed to by the parties may be enforced as an unagreed judgment by an appellate court editing it to delete the words which say it is "agreed."

14. Whether a rubber stamp impression of a copy of a Texas Judge's signature on an "order" constitutes a judge's signature and creates a court order if the

judge did not know the contents of the purported "order," did not know that his name was placed on the "order," did not direct that his name be placed on the "order," was not present when the "order" was rubber stamped and did not decide to create, sign, or enter the "order" despite the holdings of the Texas Court of Criminal Appeals and Texas Supreme Court that it is not a "signature" and has no effect.

15. Whether legal services are a specie of property which may not be "taken" for public use without due process of law and compensation for their fair market value, as provided by the due process clause of the clause of the Fifth Amendment to the Constitution.

16. Whether requiring a particular lawyer, or group of lawyers within a state to provide free or subsidized legal services, or pay cash in lieu of services, while other lawyers within that state are not required to do so violates the equal protection clause of the Fifth Amendment to the Constitution.

Parties to the Proceeding Below

Petitioner: Allan Hawkins

Respondent: Texas Commission for Lawyer Discipline

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9	1. This court's review is necessary to correct the clear error of the Texas Supreme Court and El Paso Court of Appeals which rejected the holding of this court that legal disciplinary proceedings are quasi-criminal punitive proceedings which require quasi-criminal due process including adequate notice, strict construction of the rules, and adherence to the procedures mandated by applicable disciplinary law.
12	2. This court's review is needed because the courts below create the precedent that a lawyer may be punished for refusing to represent an

indigent criminal defendant when the lawyer knows that he or she is not competent to do so, but that the lawyer is immune from punishment if the lawyer represents the indigent incompetently and the judge presiding over the criminal case nullifies the requirement of lawyer competence.

14. 3. This court's review is needed because the disciplinary rules are unconstitutionally vague as written, or as applied, or were erroneously construed, and the Texas courts use an erroneous civil standard for construing disciplinary rules.

27. 4. This court's review is necessary because forcing Hawkins to pay cash or provide compulsory services is a taking which violates the due process clause and forcing Hawkins to pay cash or provide compulsory service while not requiring the same of all similar lawyers in Texas violates the equal protection clause.

29. 5. This court's review is necessary to establish that the punishment imposed in legal disciplinary cases must be consistent with reasonable established standards, such as those published by the American Bar Association, and that only punishment which serves the goal of protecting the public may be imposed.

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Table of Cited Authorities

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20	*Argersinger v. Hamlin*, 407 U.S. 25, (1972), Justice Powell concurring.
11	*Commission for Lawyer Discipline v. Benton* 980 S.W. 2d 425, 438 (Tex. 1998)
17	Cramp v. Board of Publ Inst., Orange County, Fla., 82 S.Ct. 275, 280-81 (1961)
17	*Grayned v. City of Rockford*, 92 S.Ct. 2294, 2298-99 (1972)
10,16	*In the Matter of Sealed Appellant*, 98-31006 November 11. 1999, (5th Cir 1999)
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9	*In re Velma Barber*, 982 S.W.2d 364, 366-67 (Tex. 1998)
28	Peterson v. Jones, 894 S.W. 2d 370, 376, (Tex.Cr.App 1995)
20	*Mallard v. U.S. Dist. Court for Southern Dist. of Iowa* 109 S.Ct. 1814, 1823 (1989) Justice Stevens dissenting

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22 *State v. Gasen*, 356 N.E.2d 505 (Ohio Ct. App. - Hamilton County, 1976)

27, 29 *State v. Lynch*, 796 P2d 1150 (Okla.1990)

10,11 *State Bar of Texas v. Evans*, 774 S.W.2d 656 (Tex. 1989)

21 *State Bar of Texas v. Gomez.* 891 S.W.2d 243, 246 *(Tex 1994)*

10,16 U.S. v. Brown, 72 F3d 25, 29 (5th Cir. 1995)

22 *United States v. Wendy*, 575 F.2d 1025 (2nd Cir. 1978)

10 *Weiss v. Commission for Lawyer Discipline*, 981 S.W.2d 8, 14 (Tex. App-San Antonio 1998)

22 *US v.Wendy*, 575 F.2d 1025, 1030 (2nd Cir 1978);

11 *Wade v. Commissioner*, 961 S.W.2d 366, 371 Tex.App.—Houston [1st dist.] 1997)

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Texas Disciplinary Rules of Professional Conduct:

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3	Rule 3.04(d)
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19	ABA Standards for Criminal Justice, Providing Defense Services, 3rd Ed. (1992) (Apx 7)
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J. Houston's Harris County District Attorney investigating potential crime of assignment of lawyers based on payments to campaign fund.

Opinions Below

The opinions below are the opinion of the Eighth District Court of Appeal in El Paso Texas which is published at 988 S. W.2d 927 and issued on March 18, 1999, the denial of writ by the Texas Supreme Court on September 2, 1999 and the judgment of the trial court dated August 28, 1997

Statement of Jurisdiction

The denial of writ by the Texas Supreme Court was on September 2, 1999. A 60 day extension was granted by this court. Jurisdiction of this court is invoked under 28 U.S.C. §1257

Constitution, Statutes, and Rule Provisions

In the trial court, at the beginning of the case, Hawkins filed and argued a motion for due process as required by *In re Ruffalo*. The CLD, without explanation, argued that *In re Ruffalo* does not apply. Hawkins filed a motion for due process under the federal constitution on December 9, 1996 and reurged constitutional notice, strict construction of the rules, and quasi-criminal due process. The judge denied the motion in writing, and denied additional motions and objections based on these grounds throughout the proceedins. The federal constitutional issues have been urged throughout the proceeding at every level Hawkins requested strict construction of the disciplinary rules as is required for professional discipline cases. The trial judge ruled that this was a civil case and strict construction was not to be used. The court of appeals affirmed on all federal issues that

strict construction was not the correct standard and that purely civil due process was sufficient. The Texas courts apparently think that lawyers are not entitled to normal due process,

> Mr. Gladney: All I would say very respectfully, your Honor, is that these rules, I think, are difficult to interpret. I really think they are too difficult to interpret. That's why I think they are constitutionally vague.
>
> The Court: Let's remember that lawyers are officers of the Court. And we don't construe these rules like we do statutes in our Penal Code, I don't think. (SF4,p322,ln9-16)

The constitutional provisions involved in this case provide:

> No person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. Fifth Amendment, U.S. Constitution.
>
> Nor shall any state deprive any person of his life, liberty, or property, without due process of law nor to deny to any person within its jurisdiction the equal protection of the laws. Fourteenth Amendment, U.S. Constitution.

Texas Disciplinary Rules of Professional Conduct

"a lawyer shall not accept or continue employment

in a legal matter which the lawyer knows or should know is beyond the lawyer's competence.." rule 1.01(a)

"A lawyer shall decline to represent a client ... if: (1) the representation will result in violation of ... applicable rules of professional conduct or other law;" rule 1.15(a)(1)

"A lawyer may refuse to comply with an obligation imposed by law (including regulations of the practice of law) upon a good faith belief, openly asserted, that no valid obligation exists." Rule 8.04, Comment 6.

"A lawyer shall not ... (d) knowingly disobey ... an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based ... on an assertion that no valid obligation exists...." Rule 3.04(d)

"A lawyer shall not: ... seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure; ... A matter is "pending" before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected." Rule 3.05 (a) & (g)

"Many forms of improper influence upon tribunals are proscribed by criminal law or by applicable rules of practice or procedure. Others are specified in the Texas code of Judicial Conduct. A lawyer is required to be familiar with, and to avoid contributing to a violation of, all such provisions." cmt 1, rule 3.05

"A lawyer shall not:... (5) state or imply an ability to influence improperly a government agency or official; (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial

conduct or other law;..." rule 8.04(a)

Texas Code of Judicial Conduct

"A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.... Canon 2 B

"A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business." Canon 3 C (1)

"A judge shall exercise the power of appointment impartially and on the basis of merit. Canon 3 C (4). Disciplinary Responsibilities.

Statement of the Case

This is an attorney discipline case. The case was tried below as a purely civil case, not a quasi-criminal case. The trial court refused quasi-criminal due process and the appellate courts held that disciplinary proceedings are not quasi-criminal proceedings.

Hawkins is an estate planning, probate, and tax attorney who does not practice criminal law. Hawkins refused to represent a defendant in a criminal case because Hawkins knew that the matter was beyond his competence and the Texas disciplinary rules prohibited him from accepting the representation. Hawkins informed the court and the defendant of his refusal and urged the court to appoint competent counsel for the defendant. The trial court held that Hawkins' refusal occurred at a time when it did not prejudice the defendant. Eventually, another lawyer was appointed and the defendant was acquitted.

Hawkins believed that his refusal to accept representation of the defendant meant that he did not represent the defendant; that he had no attorney-client relationship from which to withdraw; that purporting to represent the defendant would have been improper; and that representing the defendant would have violated disciplinary rules 1.01(a) and 1.15(a). Therefore, after refusing to accept representation of the defendant, Hawkins did not represent the defendant. And there is the rub. Hawkins was not accused of violating the disciplinary rules by refusing to accept representation of the defendant, but rather, by not representing the defendant after he refused to accept the representation.

The accepted that the criminal case was beyond Hawkins competence and did not put on any evidence to the contrary. The only evidence is that it was beyond his competence. The case was tried on that assumption.

The Texas courts below held that, by not representing the defendant, Hawkins violated the rules against neglect of a client and properly withdrawal from representation of a client, violating Texas disciplinary rules 1.01 and 1.15.

The court below concluded that, even though Hawkins was required to refuse to represent the defendant if the defendant was wealthy, since the defendant was indigent, Hawkins should have represented the defendant even though he knew he was incompetent to do so, because the court, without saying so, and without intending to do so, nullified the requirement of competence.

The courts below did not analyze whether representation by a lawyer who is not competent satisfies the defendant's right to counsel.

Statement of the Facts

Daniel Sundy followed his doctor's advice to use an illegal medicine (marijuana) to treat his terminal illness (full blown AIDS). Sundy was driving through Midland County, Texas to his home in Howard County when he was stopped for a minor traffic violation. When stopped, Sundy was sporting a pony tail and wearing a T-shirt protesting that the criminal courts of

Midland County were unjust to homosexuals. The deputy sheriff was not sympathetic. Sundy's car was searched, and a user's amount of marijuana was found. Sundy was jailed, and released on bond. This was the first time in his life that Sundy had been accused of a crime, and the only time he was in jail. He was not in jail again. Sundy was indigent. His sole support was SSI.

Later, Sundy was informed that Hawkins had been designated to represent him. Sundy informed Hawkins who explained that, since he did not practice criminal law and was not familiar with criminal law or criminal procedure, the case was beyond his competence and he was ethically prohibited from accepting representation of Sundy. Hawkins declined to represent Sundy. He informed the court that he had declined and Sundy did not have a lawyer. The trial court found the key fact:

> "At a time when it did not prejudice Sundy, Hawkins advised Judge Fitz-Gerald that Hawkins was incompetent to represent the defendant and that for such reason Hawkins declined the appointment. Hawkins refused to represent Sundy, maintaining the position that he asserts in this disciplinary proceeding - that having the belief that he is incompetent to adequately represent the defendant, to represent the defendant would be a violation of the disciplinary Rules, particularly Rules 1.01(a), 1.15(a)(1), and 6.01."

In Midland County, defendants typically wait years for trial. Lawyer's are not provided for indigent

defendants until after repeated efforts to obtain a guilty plea from the unrepresented indigents. See statement by Midland County District Attorney, Appendix K.

Ultimately the court appointed a willing and able lawyer for Sundy. At the request of the prosecutor, the court acquitted Sundy of the offense of possession of marijuana. Sundy's acquittal by the court was extraordinary. The *Texas Judicial System Annual Reports* state that, from 1992 through 1998, there were 19,698 convictions, but only 1 acquittal by a judge in the county courts in Midland County. (That acquittal was in 1995, when Daniel Sundy was acquitted.

Sundy was satisfied with the result, but the County Judge was not. The County Judge and bar initiated this proceeding because Hawkins did not pay cash to the Midland County Bar Association, or represent Sundy incompetently and plead him guilty.

In Texas, criminal trial courts have the statutory duty to use judicial discretion to appoint lawyers for indigent defendants. This judicial duty may not be delegated. Tex.Att.Gen.Op. JM-161 June 7, 1984 and DM-354 June 22, 1995. The Midland County courts reject Texas law and delegate their appointment power to a private informal local ad hoc association known as the Midland County Bar Association ("Association").

This Association uses its control over court appointments to raise money. The Association selects lawyers from whom it "assesses" "contributions" by informing those lawyers that they will be appointed to represent indigent criminal defendants unless they pay the Association for protection from court

appointments, but if they do pay the cash "assessed," they will be appointed.

Hawkins believes that buying protection from a court appointment is a crime, so he did not pay. Hawkins was named by the Association to represent an indigent defendant because he did not buy protection from appointment. No judge decided to appoint Hawkins. No judge knew he was designated for appointment. Judge Fitz-Gerald testified that he did not know who was designated; he did not know Hawkins was designated; and he did not know Hawkins was on the list; and he did not sign an order appointing Hawkins. Judge Fitz-Gerald testified that his name was, literally, rubber stamped on the order without his knowledge of its contents, without his thought or judicial discretion, and without his presence. The document named Hawkins solely because he did not pay cash to the Association to avoid appointment. Judge Fitz-Gerald explained that he did not select lawyers to represent indigent defendants because the private association designated the lawyer. Under Texas law, the rubber stamped impression of the judges name is not a "signature" and the document is not a "court order." Thus, it had no legal effect. *In re Velma Barber, 982 S.W.2d 364, 366-67 (Tex. 1998)*

Reasons for Granting the Writ

1. This court's review is necessary to correct the clear error of the Texas Supreme Court and El Paso Court of Appeals which rejected the holding of this

court that legal disciplinary proceedings are quasi-criminal punitive proceedings which require quasi-criminal due process including adequate notice, strict construction of the rules, and adherence to the procedures mandated by applicable disciplinary law.

This court held that attorney disciplinary proceeding are quasi-criminal proceedings for which the United States Constitution require quasi-criminal due process. *In re Ruffalo*, 390 U.S. 544, 551-52 (1968). The 5th Circuit follows *Ruffalo*. *In the Matter of Sealed Appellant*, 98-31006 November 11. 1999, (5th Cir 1999) ("Disbarment cases are quasi-criminal proceedings, and any disciplinary rules employed to impose disbarment must be strictly construed, resolving ambiguities in favor of the attorney charged. ....An attorney subject to disciplinary proceedings is entitled to due process [citing *In re Ruffalo].") U.S. v. Brown*, 72 F3d 25, 29 (5th Cir. 1995) (attorney suspension is a quasi-criminal punishment)

The Texas courts denied Hawkins the quasi-criminal due process he requested. This is the the Texas way. Texas denies quasi-criminal due process in legal disciplinary proceedings. Texas first rejected quasi-criminal due process in a footnote in the per curium opinion in *State Bar of Texas v. Evans*, 774 S.W. 2d 656, 657 (Tex. 1989). The Texas Supreme Court recently affirmed *Evans*. The court of appeals in the case at bar followed Evans and Benton and applied civil standards of construction and due process. Opinion at 13

"Courts demand less precision of statutes that

impose only civil penalties than of criminal statutes because their consequences are less severe. See Village of Hoffman Estates, 455 U.S. at 498. Attorney disciplinary proceedings in Texas are civil, see State Bar v. Evans, 774 S.W.2d 656, 657 n.1 (Tex. 1989), so disciplinary rules need not satisfy the higher degree of specificity required of criminal statutes. See State Bar v. Tinning, 875 S.W.2d 403, 409 (Tex. App.--Corpus Christi 1994, writ denied)" Commission for Lawyer Discipline v. Benton 980 S.W. 2d 425, 438 (Tex. 1998)

Due process violations permeated this case. The plain language in the procedural rules requires that every allegation first is made in a *complaint* that is processed through an investigatory committee with either a dismissal or a finding of *just cause*. The CLD rejects those requirements and proceeds to court without the administrative *just cause* finding that is a prerequisite for suit. See *Wade v. Commissioner*, 961 S.W.2d 366, 371 Tex.App.—Houston [1st dist.] 1997) The CLD openly asserts that it can make any allegation it chooses without the allegation having been made in any *complaint* heard by any investigatory committee, and without *just cause* having been found.

The disciplinary procedure rules only give district courts jurisdiction for a trial de novo of the actual administrative *complaint* for which *just cause* was found. The CLD refuses to prove that there was any allegation in any *complaint* filed with the bar or that *just cause* was found for anything at all. This is standard CLD policy. The CLD did the same thing in a

prior case between the same parties in which Judge Cherry rejected this violation of due process. The CLD, without Complaint, just cause findings, or notice, recycled the estate matters even though it was a final judgment against the CLD in prior litigation between the parties over that issue. On February 22, 1996, Judge Cherry signed the final judgment involving the estate stating "[Hawkins] has committed no acts or omissions which constitute professional misconduct with respect to any of the matters alleged by [CLD]." The CLD did not appeal. The judgment became final in 1996 The statute of limitations on discipline expired in 1995, before the present case was filed. Instead of appealing the final judgment that Hawkins' did not violate any disciplinary rule, the CLD sought to punish Hawkins in this new proceeding for those same acts violating Hawkins right to only be tried once for the matter. The CLD allegations were rejected by the trial court because they were made with no notice whatsoever, but the court of appeals erroneously relied on them to support the judgment. Opinion at 18.

2. This court's review is needed because the courts below create the precedent that a lawyer may be punished for refusing to represent an indigent criminal defendant when the lawyer knows that he or she is not competent to do so, but that the lawyer is immune from punishment if the lawyer represents the indigent incompetently and the judge presiding over the criminal case nullifies the requirement of lawyer

competence.

The trial court correctly found that Hawkins refused to represent Sundy. Yet, the trial court punished Hawkins for not *adequately* representing Sundy (rule 1.01) and for *not properly withdrawing* from representation of Sundy (rule 1.15) Since Hawkins did not accept employment to represent Sundy, Hawkins owed no ethical duty under rule 1.01 which relates to *representing a client* competently or under that part of rule 1.15 which relates to withdrawal *from an existing attorney-client* relationship. When a lawyer refuses a court appointment, the lawyer does not represent the accused. That would be true even if the lawyer violated rule 6.01. Rules 1.01(b), 1.15(c), and 1.15(d) only apply within the scope of an attorney-client relationship, as do most rules.

> "Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so." *Texas Disciplinary Rules of Professional Conduct*, Preamble: Scope: Paragraph 12

The CLD formally admitted that the rules relied on by the court below do not apply if the lawyer refuses to represent someone. The CLD admitted to the following:

> 1. "If a lawyer is offered employment by a potential client and declines the employment, the *lawyer has acted consistently with the Texas Disciplinary Rules of Professional Conduct.* The

lawyer who declined the offer of employment by a potential client *does not have any further obligations* under the Texas Disciplinary Rules of Professional Conduct."

2. "A lawyer who refuses to represent a potential client has *no ethical obligation* to the potential client."

3. "1.01(b) *does not apply* to a lawyer who is not representing a client."

4. "1.15 imposes *no obligation* on a lawyer who declines to represent someone."

5. The word "neglect," as used in Rule 1.01, does not apply to any situation other than a responsibility of a lawyer to a client of that lawyer.

6. The CLD does not claim that Rule 1.01(b) applies to lawyers not representing a client.

7. Rule 1.01(b) does not apply to a lawyer when (1) a lawyer is approached by a client who requests legal representation, (2) the lawyer determines that the lawyer is not competent to represent the client, and (3) the lawyer declines to represent the client.

8. When asked, "if a lawyer declines to represent a client in a matter, do you assert that the lawyer subsequent to declining, has any obligation, pursuant to Rule 1.15?" the CLD answered, "no."

3. This court's review is needed because the disciplinary rules are unconstitutionally vague as written, or as applied, or were erroneously construed, and the Texas courts use an erroneous civil standard

for construing disciplinary rules.

"Disbarment cases are quasi-criminal proceedings, and any disciplinary rules employed to impose disbarment must be strictly construed, resolving ambiguities in favor of the attorney charged.... " *In the Matter of Sealed Appellant*, 98-31006 November 11. 1999, (5th Cir 1999)

If the rules can be construed in favor of Hawkins, they must be so construed. The court of appeals rejected that approach, ignoring testimony and authority that supported Hawkins construction of the rules, "Hawkins called several attorneys who testified that in their opinions, the Rules could be read to require Hawkins to act in the manner he did. As such, Hawkins' evidence does little, if anything, to contradict the facts supporting his violation of the Rules as appropriately interpreted." Opinion at page 18 The trial court seemed to take the same approach of seeking a construction that would warrant a penalty, since Hawkins is an attorney.

> Mr. Gladney: ...these rules, I think, are difficult to interpret. I really think they are too difficult to interpret. That's why I think they are constitutionally vague.
>
> The Court: Let's remember that lawyers are officers of the Court. And we don't construe these rules like we do statutes in our Penal Code, I don't think. (SF4,p322,ln9-16)

"Because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving ambiguities in favor of the person charged." *U.S. v. Brown*, 72 F3d 25, 29 (5th Cir. 1995)

" '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed.888. 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' United States v. Cardiff, 344 U.S. 174, 176, 73 S.Ct. 189, 190, 97 L.Ed.200. 'In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or

standard that is so vague and indefinite as to be really no rule or standard at all.'" *Cramp v. Board of Publ Inst., Orange County, Fla.*, 82 S.Ct. 275, 280-81 (1961)

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 92 S.Ct. 2294, 2298-99 (1972)

The rules construed by the court below can be read as Hawkins and all of the lawyers who testified in the trial court read them. If they can also be read as the Court of Appeals reads them, they are unconstitutionally vague. As applied, they are

unconstitutionally vague. Indeed, in the trial court, the CLD argued that the rules mean what Hawkins believes they mean. The CLD later flip flopped to adopt the court's novel construction of the rules. In his closing argument, Mr. Molleston, trial attorney for the CLD advocated the same construction as Hawkins. He said:

> "When [Hawkins] got Judge Fitz-Gerald's order appointing him to be the attorney of record, he should have stopped doing anything. He should have sent a clear message that he was not going to represent Mr. Sundy. ...he should have said ... Judge Fitz-Gerald, I'm not going to do it. I respectfully decline, Judge Fitz-Gerald to represent this man in your court. And you must do something else other than expect me to come up here and represent him, because I'm not going to...."

A reasonable lawyer may read the rules as mandating that a lawyer must decline appointment to represent an indigent defendant if the lawyer knows that the lawyer is not competent to handle the matter. This mandate is confirmed by (1) Comment 1 to rule 6.01; (2) the testimony of all of the lawyers who testified on the issue in the district court in this proceeding; (3) Texas Ethics Opinion #477; (4) the ABA; (5) Court decisions; (6) ethical treatises; and (7) a prior Texas ethics investigatory committee which held that 1.01(a) prohibited Hawkins from accepting a court

appointment to represent an indigent criminal defendant in similar circumstances. The Court of Appeals opinion is contrary to all authority, even authority quoted by the Court of Appeals which stated, "a lawyer may decline a representation that could not possibly be handled by the lawyer in a competent manner..."

> "An attorney who is not competent to handle a criminal case has an absolute duty to decline court appointment." *ABA Standards for Criminal Justice, Providing Defense Services, 3rd Ed.* (1992), p 35.

> "*State v. Gasen*, 48 OhioApp2d 191, 356 NE2d 505 (1976) (counsel should decline appointment if truly unable to prepare party's case fully and adequately); *Easley v. State*, 334 So2d 630 (Fla DistCtApp 1976) (counsel cannot be held in contempt for attempting to withdraw as appointed counsel for defendant on ground of incompetency to handle felony criminal matters, even though he previously represented indigents accused of misdemeanors.) *See also* Tennessee Ethics Opinion 81-F-24 (1981) (lawyer who is not competent to handle criminal cases should decline court appointment)." *ABA/BNA Lawyers' Manual on Professional Conduct*, 2-27-91 pp.13-14

> "There are, of course, many situations in which a lawyer may properly decline such representation.

He or she ... may not have the qualifications for a particular assignment." *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa* 109 S.Ct. 1814, 1823 (1989) Justice Stevens dissenting

"Of [attorneys] in general practice, we have no indication how many are *qualified* to defend criminal cases or *willing* to accept assignments ...."*Argersinger v. Hamlin*, 407 U.S. 25, (1972), Justice Powell concurring

"Good cause [to decline a court appointment exists] if the lawyer could not handle the matter competently ... [rule] 6.01 Cmt 1.; *cf.* Tex. Com. on Professional Ethics, Op. 477 (considering whether a lawyer could be subject to discipline for refusing to accept a criminal appointment on competency grounds, and stating that good cause to seek to avoid an appointment exists 'if the lawyer cannot handle the matter competently')." Herring, *Texas Legal Malpractice and Lawyer Discipline*, 2nd ed. (1997), §4.51, Appointments and Pro Bono Service.

The only official ethics authority in Texas guided Hawkins to do precisely what he did. *Texas Ethics Opinion #477* (1993) dealt with the specific issue in this case.

"In the 10 years that he has been a licensed Texas attorney, he has never handled a criminal matter.... [T]he rules do provide that a 'lawyer

shall not seek to avoid appointment by a tribunal to represent a person except for good cause ...' (*Id.*, Rule 6.01 (1990)). Comment 1 to rule 6.01 states: 'For good cause a lawyer may seek to decline appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular.' Good cause exists if the lawyer cannot handle the matter competently. (See, *Id.*, Rule 1.01)."

"The committee further notes that the rules also provide that a lawyer may refuse to comply with an obligation imposed by law (including regulations of the practice of law) upon a good faith belief, openly asserted, that no valid obligation exists. (*Id.*, Rule 8.04, *Comment* 6.)" Texas Ethics Opinion #477

A subordinate court may not usurp the Texas Supreme Court's authority to regulate the legal profession. *State Bar of Texas v. Gomez.* 891 S.W.2d 243, 246 *(Tex 1994)* No subordinate court may promulgating policies and regulations governing Texas lawyers. *Gomez at 246* The Court of Appeals erred by concluding that the Midland County Court nullified the requirement that a lawyer decline a case which the lawyer knew was beyond his competence. ("Judge Fitz-Gerald's order insulates him from discipline under the rules.") Similarly, the district court held that the county court "ordered his appointment to continue. Surely this ruling afforded Respondent a shield against a charge

of being in violation of Rule 1.01(a)." The court's conclusion is erroneous and unsupported by authority. There is no order which purports to shield Hawkins from 1.01(a), nor could there be. A county court may not exempt a lawyer from rule 1.01(a). *US v. Wendy*, 575 F.2d 1025, 1030 [Footnote 22 therein] (2nd Cir 1978); *State v. Gasen*, 356 N.E.2d 505 (Ohio Ct.App.-Hamilton County, 1976)

Marshall Shelsy, staff attorney of Houston's Harris County Courts, and an author and lecturer on Texas Judicial and coauthor of the standard manual for Texas Judges testified as follows in response to questions posed by Hawkins' attorney, John Gladney, a former chief disciplinary counsel for the Texas Bar.

Mr. Gladney: Are you familiar with the system employed in Midland County, whereby all attorneys are placed on a list for appointment; appointments are made alphabetically, except that lawyers who wish to pay $200 to what is called the Midland Bar Plan are exempted from appointments?

Mr. Shelsy: I understand that's the way the plan operates, yes.

Mr. Gladney: Does either phase, the alphabetical appointment without any showing of competency, or for that matter, the exclusion under the Midland Bar Plan, satisfy the requirements of either the statute or constitutional law, as you understand it?

Mr. Shelsy: As I understand it, they would not.

...Mr. Gladney ...the Court must consider... the competency ...of the attorney, is that correct?

Mr. Shelsy: Yes, sir.

Mr. Gladney: ...if the evidence in this case is that the selection was actually random and, in fact, was rubber stamped by a secretary, and the judge didn't even know of a certain appointment of a lawyer, and there was no inquiry initially as to competency, would that pass either constitutional or statutory muster under the law, as you understand it?

Mr. Shelsy: No, sir. It would be contrary to both -- I think the Constitution, some case law, and probably violate the Code of Judicial Conduct.

Mr. Gladney: Now the exclusion, which is provided by the Midland Bar Plan, can be [bought] by competent or incompetent lawyers. It makes no difference. So would that ... be a justifiable or a legal methodology of excluding lawyers from appointment?

Mr. Shelsy: Not under the Disciplinary Rules, as I read them.

Mr. Gladney: All right. Are you aware of the fact generally that lawyers are to accept appointments and not seek to avoid appointment, except for certain very limited reasons?

Mr. Shelsy: Yes, sir.

Mr. Gladney: And is one of those limited reasons the payment $200 to the Midland Bar Plan?

Mr. Shelsy: No, sir.

Mr. Gladney: And so would it be in the literal reading of the rule, a violation for a lawyer to make a payment to the Midland Bar Plan?

Mr. Shelsy: Yes.

Mr. Gladney: In the literal reading of the rule, would it

be a violation for lawyers to solicit payment to the Midland Bar Plan, and that is, to solicit a payment which would allow a lawyer to not accept an appointment, except under those areas designated by 6.01 of the Disciplinary Rules?

Mr. Shelsy:I think it would violate both the Disciplinary Rules as well as potentially the Penal Code.

...Mr. Shelsy: My reference is to Section 36.02, Penal Code, Subsection (a) (3). "A person commits an offense if he intentionally or knowingly offers, confers or agrees to confer on another, or solicits, accepts or agrees to accept from another any benefit as consideration for a violation of a duty imposed by law on a public servant or party official."

Mr. Gladney: ...solicitation of monies for the purpose of influencing a public official to violate a duty which was imposed upon him, that is, namely, to make the appointments of lawyers for indigent defendants, is that correct?

Mr. Shelsy: Yes, sir.

Mr. Gladney: And, in effect, what occurs is ... the judges ... are delegating their responsibility to the Midland Bar Plan, to determine which lawyers would be excluded from appointments.

Mr. Shelsy: Yes.

Mr. Gladney: And would you understand that to be an illegal act?

Mr. Shelsy: Yes.

Mr. Gladney: And as to the literal reading of the statute, ... it would constitute bribery?

Mr. Shelsy: Yes, sir.

Mr. Gladney: Would you agree that a lawyer who reads those Disciplinary Rules and makes a determination that under Rule 1.01(a), that the requirement is that he make the determination whether he is competent, and if he is not competent, not to accept the appointment, that that would be at least whether it is later found to be the case, or not, in a conflicting statute situation, at least a good faith determination by the lawyer?

Mr. Shelsy: Yes, sir. It is a very reasonable reading of that provision.

Mr. Gladney: Do you actually have an opinion as to whether that reading is accurate?

Mr. Shelsy: I believe it is accurate, yes.

Mr. Gladney: Assume with me that the events of this particular case occurred in 1995, and involved a misdemeanor case of possession of marijuana, with an aggravating situation that the Defendant was a person with AIDS, who said that he was using the marijuana for medicinal purposes. Would that strike you as a case that would be complicated or uncomplicated?

Mr. Shelsy: ...any criminal case between 1992 and 1996, was inherently made more complicated by the series of legislative changes... Everything from the collateral consequences to criminal acts, that is, the traditional punishment in Texas is confinement or a fine or both. Suddenly, the added caveat of driver's license suspension became possible in unrelated -- or in cases not related to driving offenses, child support in the family side, possession of marijuana

in the criminal side. Varying offenses based upon age of the offender triggered different types of collateral consequences. How we administered justice, and the probation and community supervision changes, all made for an atmosphere in which lawyers and judges had to look and look again at each case, and reference and cross-reference what the law was, what procedure said. ...We underwent massive, ... judicial and ... attorney education efforts over several years, to try and bring up to speed even the specialists and the members of the judiciary. So any case was complicated. For someone who was not a criminal practitioner, ... it is a malpractice land mine that's certain to go off.

Mr. Gladney: And let's assume that the Court, on the motion to appoint effective counsel, rather than appointing a different counsel, simply said, Mr. Hawkins is competent. I find he is competent, and order that he continue the representation. And then assume with me that Mr. Hawkins openly stated that he would not accept that representation, felt he could not do so ethically, and did not represent the Defendant. Would that position, even in light of the second court order, in your opinion, be reasonable, based upon what you understand to be the Disciplinary Rules that relate to the issue of providing competent counsel?

Mr. Shelsy: I think he would have to insist, yes. I think that's a reasonable position.

...Mr. Gladney: In your belief, would a lawyer who asserts that he is not competent, in good faith, and

who declines representation based upon his good faith understanding of the Disciplinary 'Rules, be showing respect or disrespect for the judicial system by taking that action?

Mr. Shelsy: No, I think the lawyer would be showing a great deal of respect, especially in light of events of recent years.

4. This court's review is necessary because forcing Hawkins to pay cash or provide compulsory services is a taking which violates the due process clause and forcing Hawkins to pay cash or provide compulsory service while not requiring the same of all similar lawyers in Texas violates the equal protection clause.

Lawyers have due process rights and equal protection rights. *State v. Lynch*, 796 P.2d 1150, 1157-59 (Okl.1990) (recognizing a lawyer's services are property may not be "taken" or compelled without due process of law; that lawyers in one part of Oklahoma may not be required to provide or subsidize indigent defense unless all lawyers in Oklahoma have the same obligation; stating that rule 6.2 [rule 6.01 in Texas] and the comments thereunder "provide that a lawyer may refuse an appointment for the representation of an indigent.")

Judge Maloney of the Texas Court of Criminal Appeals, the highest Texas criminal court, stated:

> [In] *State ex rel. Stephan v. Smith*...(1987) ... the Kansas Supreme Court held that when an attorney was required to advance expense funds

out-of-pocket for an indigent without full compensation, the system violated the Fifth Amendment of the United States Constitution. .... Courts in other states have similarly held that the services of an attorney are a type of property subject to the protection of the Fifth Amendment, and failure to compensate court-appointed attorneys adequately is unconstitutional. *Arnold v. Kemp* [Arkansas 1991]; *DeLisio v. Alaska* [Alaska 1987]; *McNabb v. Osmundson* [Iowa 1982]; *Bias v. State* [Okla. 1977]; *State ex rel. Partain v. Oakley* [W. Va. 1976); *People ex rel. Conn v. Randolph* [Ill.1966]. In *Arnold* ...774, the Arkansas Supreme Court held:

> When attorneys' services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good. And certainly when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money.

Other states have held that the appropriation of an attorney's labor is a "taking" under the provisions of the state constitution. *DeLisio*, 740 P.2d at 444. *Peterson v. Jones*, 894 S.W. 2d 370, 376 (Tex.Cr.App 1995)

In the present case, the required due process to allow a "taking" of Hawkins' services. Hawkins was not

paid for his time or for his out of pocket cash expenses, nor was any payment made to charity as requested by Hawkins. This was an unlawful "taking" without any compensation in violation of the Fifth Amendment.

Two classes of lawyers are treated unequally. The first class is those selected for the solicitation by the Association. They must pay money (a "taking") or be appointed to provide compulsory legal services (also a "taking"). The other is those not selected by the Association. They incur no taking. Under any level of scrutiny, that is an unconstitutional classification in violation of constitutionally mandated equal protection. *State v. Lynch*, 796 P.2d 1150, 1157-59 (Okl.1990)

5. This court's review is necessary to establish that the punishment imposed in legal disciplinary cases must be consistent with reasonable established standards, such as those published by the American Bar Association, and that only punishment which serves the goal of protecting the public may be imposed.

Hawkins refusal to represent Sundy did not put Sundy at risk. "A judgment of conviction in a misdemeanor case punishable by imprisonment is void where the defendant is too poor to employ counsel and the trial court has failed to appoint counsel to represent him, unless counsel has been waived by the defendant." Tex.Att.Gen.Op. No. 598, p.2892

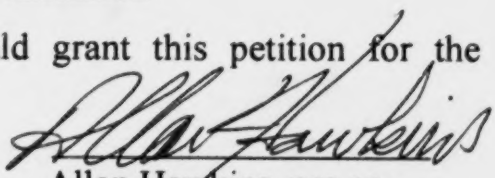
Punishment imposed in legal disciplinary cases should be consistent with established standards, such

as those published by the American Bar Association. Texas has no standards. Only punishment which protects the public is appropriate in professional discipline cases.

Under the ABA standards for the violations found in this case, a private reprimand or admonition would have been the maximum appropriate sanction. The trial court, acting without ascertainable or reviewable standards, imposed a long term suspension blended with taking hundreds of hours of unpaid legal services from Hawkins and giving the services to clients selected by the same Association that "assessed" a "donation" to avoid appointments. Requiring free services constitutes a fine or a "taking" which is never an appropriate penalty in a professional discipline case. A lawyer may not be punished by requiring the lawyer to practice law in Midland County, Texas, to maintain a Texas law license, to not practice law under a license from a federal court, or court of another jurisdiction, or to practice a certain type of law for clients selected by a private association.

Conclusion

The Court should grant this petition for the reasons stated.



Allan Hawkins, pro se
PMB #147
3370 N. Hayden Road #123
Scottsdale, Arizona 85251
602-770-5906

41,132
In the district court of Midland County
Hawkins v.
COMMISSION FOR LAWYER DISCIPLINE

MEMORANDUM DECISION

The Petitioner, Commission for Lawyer Discipline, has brought this proceeding against the Respondent, Allen R. Hawkins, as a disciplinary action against Respondent, an attorney licensed to practice law in Texas. Respondent is charged with having violated three of the Texas Disciplinary Rules of Professional Conduct, specifically Rules 1.01 (b)(1), 1.15(c), and 1.15(d). The case came to trial before me on April 21, 1997, and after having heard the arguments of counsel at the close of evidence, the Court called for briefs from counsel, which have been submitted and considered, and I find that Respondent has been proven to be in violation of each of such Rules.

There is little, if indeed any, dispute regarding the material facts disclosed by the evidence presented by the Petitioner at the trial before the Court, the Respondent having withdrawn and waived his demand for jury trial, and having rested without presentation of any evidence when Petitioner rested its case. Respondent was appointed by Judge James Fitz-Gerald, III of the Midland County Court at Law to represent an indigent defendant charged with possession of a quantity of marihuana, a Class B Misdemeanor offense. Pursuant to such appointment, Respondent inter-

viewed the defendant at the Midland County jail where the defendant was being held in lieu of ball while awaiting trial, and Respondent then learned that his appointee client was HIV Positive and was claiming to need and use marihuana to enable him to take food and nourishment without becoming nauseated. Respondent limited his practice of law to the fields of taxation, probate and trusts, and had somewhat limited experience in criminal trial work. Respondent, believing he was incompetent to adequately represent his appointee and present such use of marihuana either as a defense to the charge or to effectively negotiate a favorable disposition of the charge with the prosecutor, advised Judge Ftitz-Gerald that Respondent was incompetent to represent the defendant and that for such reason Respondent declined the appointment. After a hearing conducted by Judge Fitz-Gerald, Respondent was held to be competent to represent the defendant and ordered to continue to represent him in such criminal proceedings. Respondent refused to represent his appointed client, maintaining the position that he asserts in this disciplinary proceeding -that having the belief that he is incompetent to adequately represent the J defendant, despite a finding by the Court to the contrary after being afforded a hearing on such contention, to further represent the defendant would be a violation of the disciplinary Rules, particularly Rules 1. 15(a)(1) and 6.0 1 (a).

In his steadfast refusal or declination to represent his assigned client, the Respondent in a terse

letter to him said he was not his lawyer, and thereafter failed to notify him of scheduled court proceedings in the case, resulting in the client's having to appear and defend himself against a revocation of ball, a matter of extreme anxiety on the client's part because of his medical condition

Those parts of the Disciplinary Rules that are applicable to this proceeding are as follows

Rule 1.01 -Competent and Diligent Representation

(b) In representing a client, a lawyer shall not (1) neglect a legal matter entrusted to the lawyer

Rule 1 15 -Declining or Terminating Representation

(c) When ordered to do so by a Tribunal, a lawyer shall-continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as givingreasonable notice to the client, allowing time for employment of other counsel, ---

Rule 6.01 -AcceptingAppointments By a Tribunal

A Lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of law or rules of professional conduct-,

Comment -Appointment

2. An appointed lawyer has the same obligations to the client as retained counsel, including the same obligations of loyalty and confidentiality, and is subject to the same limitations on the chent-attorney relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

I conclude that Respondent's conduct violated Rule 1.01(b), Rule 1.15(c), and Rule 1.15(d), despite Respondent's insistence that his unilateral-declaration that his representation of his appointed client would be beyond his competence in violation of Rule 1.0 1 (a). A hearing was held on the question of whether or not Respondent was competent to represent the accused, and the appointing tnibunal determined the issue against Respondent and ordered his appointment to continue. Surely this ruling afforded Respondent a shield against a charge of being in violation of Rule 1.01(a). Respondent then had confirmation of his obligation to faithfully and diligently discharge his duties, not only to his client, but to the Court-Rule 1.01(a) cannot be construed or conjured up to allow Respondent to walk away from his client to fend for himself in further court proceedings, under the facts and circumstances of this case.

Turning to the decision of a proper sanction to be imposed upon the Respondent for his violations of

the Disciplinary Rules, I have undertaken a review of disciplinary sanctions reported in the Texas Bar Journal for the past two years in an endeavor to have some guideline of fairness to the Commission for Lawyer Discipline, the Respondent, the legal profession, and the public, I find Respondent should be suspended from practice for one year, effective September 1, 1997, to be followed by a three year period of probation under usual conditions as regularly recommended by the Commission plus a requirement that Respondent participate in 15 hours per month pro bonoservices to indigent persons, as referred to him by the Midland County Bar Association, in need of wills, powers of attorney, and similar services and instruments within the field of his expertise.

The sanction imposed is for the misconduct alleged and proven, as this is what Respondent was prepared to defend against. The evidence presented on May 30, 1997, at the sanctions hearing, while not the basis of the sanctions herein imposed, certainly support this decision to so suspend and thereafter regulate Respondent's privilege to practice law.

Counsel for the Petitioner should prepare and submit to me a draft of the judgment to be signed by me and then to be certified by the Clerk.

Signed on this 18th day of July, 1997.
s/George M. Thurmond Judge, 63rd Judicial District on Assignment

41,132
In the district court of Midland County
Hawkins v.
COMMISSION FOR LAWYER DISCIPLINE

Judgment of suspension and order of probation

On the 21st day of April 1, 1997, the above-styled and numbered cause was called for trial. Petitioner, Commission for Lawyer Discipline, appeared by and through its counsel of record, and announced ready. Respondent, Allan R. Hawkins, appeared by and through his attorney of record, John Gladney, and announced ready. A jury having been waived by both parties, all matters of fact, as well as matters of law, were submitted to the Court for determination.

The Court, having read the pleadings and papers on file herein, and having received and I ion that the considered evidence, is of the opinion that the Petitioner is entitled to judgment on its Second Amended Disciplinary Petition.

The Court is of the opinion and so finds that the acts and conduct on the part of the Respondent, Allan R. Hawkins, State Bar Card Number 09245800, committed the acts of professional misconduct that are alleged in the Second Amended Disciplinary Petition. Those acts constitute professional misconduct in violation of the Texas Disciplinary Rules of Professional Conduct Rules 1.01(b)(1), 1.15(c) and

1.15(d). The Court find the Respondent GUILTY of professional misconduct as defined in Article X, §7(l) of the State Bar Rules of the State of Texas.

THEREFORE, the Court concludes and is of the opinion and so finds that the proper discipline of the Respondent for the above referenced professional misconduct Is forty-eight (48) months SUSPENSION from (the practice of law.

It is accordingly ORDERED, ADJUDGED AND DECREED that the Respondent, Allan R. Hawkins, be SUSPENDED from the practice of law in the State of Texas for forty-eight (48) months, commencing on September 1, 1997. the active part of the Suspension shall be for a period of twelve (12) months effective September 1, 1997, and ending. August 31, 1998.

It is further ORDERED that the fully probated period of suspension shall be for a period of thirly-six (36) months commencing on September 1, 1998, and ending August 31, 2000.

It is further ORDERED, ADJUDGED, and DECREED that Respondent, Allan R. Hawkins, is hereafter prohibited, effective September 1, 1997 and ending August 31, 1998, from practicing law in Texas, holding himself out as an attorney at law, performing any legal service for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representative capacity 'in an proceeding in any

Texas court or before any Texas administrative body, or holding himself out to others or using his name, in any matter, in conjunction with the words "attorney, " "counselor, " or " lawyer. "

It is further ORDERED that Respondent, Allan R. Hawkins, not later than September 1, 1997, shall notify in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every court in which Respondent, Allan R. Hawkins, has any legal matter pending, if any, of his suspension, of the style and cause number of the pending matter(s), and of the name, address, and telephone number of the client(s) Respondent is representing in that court. Respondent is also ORDERED to mail copies of all such notifications to The Office of the General Counsel, State Bar of Texas, 201 Main Street, Suite 1150, Fort Worth, Texas 76102.

It is further ORDERED that Respondent, Allan R. Hawkins, shall immediately notify each of his current clients, if any, in writing of his suspension and alert them of the option to transfer their representation to another attorney or that Respondent will arrange for another attorney to continue the representation during the twelve (12) month period of suspension. in addition to such notification, if a client chooses to transfer their representation temporarily or permanently, Respondent Is ORDERED to return all files, papers, unearned fees paid in advance, and all other monies and properties which are in his possession but which belong to

current or former clients, if any, to those respective clients or former clients within ten (10) days after the date on which the active suspension becomes effective at no cost to the client. Respondent Is further ORDERED to file with this court, within the same ten (10) days, an affidavit stating that all current Texas clients have been notified of his suspension and that all files, papers, unearned fees paid in advance, and all other monies and properties belonging to clients and former clients have been returned as ordered herein. If Respondent should be unable to return any file, papers, money or other property to any client or former client, Respondent's affidavit shall state with particularity the efforts made by Respondent with respect to each particular client and the cause of his inability to return to said client any file, paper, money or other property. Respondent is also ORDERED to mail a copy of said affidavit and copies of all notification letters to clients, to The Office of the General Counsel, State Bar of Texas, 201 Main Street, Suite 1150, Fort Worth, Texas 76102.

It is further ORDERED that Respondent, Allan R. Hawkins, on September 1, 1997, surrender his Texas law license and permanent State Bar Card to The Office of the General Counsel, State Bar of Texas, 201 Main Street, Suite 1150, Fort Worth, Texas 76102, for transmittal to the Clerk of the Supreme Court of Texas.

On September 1, 1998, Respondent shall be entitled to practice law in the State of Texas

Subject to the following terms and conditions of the probationary term of thirty six (36) months of the forty-eight (48) months suspension herein before Ordered:

1. Respondent shall not violate any of the provisions of the Texas Disciplinary Rules of Professional Conduct nor any provisions of the State Bar Rules.

2. Respondent shall not violate the laws of the United States or any other state other than minor traffic violations.

3. Respondent shall maintain a current status regarding membership fees in accordance with Article III of the State Bar Rules;

4. Respondent shall comply with Minimum Continuing Legal Education (MCLE) requirements in accordance with Article III of the State Bar Rules;

5. Respondent shall comply with Interest on Lawyers Trust Account requirements in accordance with Article XI of the State Bar Rules;

6. Respondent shall comply with all requests for information forwarded to him by any grievance committee of the State Bar of Texas;

7. Respondent shall cooperate fully with the

General Counsel's office in their efforts to monitor compliance with this order; and

8. Respondent shall provide fifteen (15) hours per month of pro bono services to indigent persons, as referred to him by the Midland County Bar Association, in need of wills, powers of attorney, and similar services and instruments within his field of expertise. Respondent shall begin this service on September 1, 1998 and continue until August 3 1, 2000. Respondent shall send a report to the State Bar of Texas, 201 Main Street, Suite 1150, Fort Worth, Texas 76102, stating that he has complied with this condition of probation. the report is due to the State Bar of Texas Fort Worth office by the 15th of each month following the previous month.

If the office of General Counsel, State Bar of Texas, or any grievance committee of the State Bar of Texas shall receive Information which shows just cause to believe Respondent has violated any term of probation, the State Bar of Texas may, in addition to all other remedies available to it, file a Motion To Revoke Probation in this Court and serve a copy of the same on Respondent, by certified mail at the address for Respondent last shown on the records of the Membership Department of the State Bar of Texas. The Court shall conduct an evidentiary hearing on such Motion at any time not prior to twenty (20) days after service of such Motion To Revoke Probation and reasonable notice of such hearing to Respondent. If the

Court, without the aid of a jury and by a preponderance of the evidence, finds that within the period of probation that Respondent has violated any of the terms of probation, the Respondent's probation may be revoked and Respondent, in addition to all other potential State Bar of Texas actions against the Respondent, or by any Court of competent jurisdiction, shall be immediately suspended, under active suspension, for a period of thirty-six (36) months from that date of any Court's finding of a violation of a term of probation or a term of this Judgment.

It is further ORDERED that the State Bar of Texas shall have judgment against Respondent for reasonable and necessary attorneys' fees in the amount of $15,000.00. Respondent shall pay said costs by mailing or otherwise delivering a certified check, money order or other form of guaranteed payment, payable to The State Bar of Texas, to the Off-ice of the General Counsel, State Bar of Texas, 201 Main Street, Suite 1150, Fort Worth, Texas 76102, Attention "Litigation." Said payment shall be delivered to the Office of the General Counsel, State Bar of Texas, within twelve (12) months from the date this Agreed Final Judgment is signed by the Judge. In the event these attorneys' fees are not paid within twelve (12) months from the date this Agreed Final Judgment is Signed by the Judge, the State Bar of Texas shall have all writs and other post judgment remedies against Respondent in order to collect all unpaid amounts; except that, in the event Respondent properly perfects an appeal of this

judgment, then collection of the said sums shall be stayed unless and until such appeal shall result in a final judgment against the Respondent herein.

It is further ORDERED that the Clerk of the Court shall forward a certified copy of Petitioner's Second Amended Disciplinary Petition on file herein, along with a copy of this Judgment, to each the Clerk of the Supreme Court of Texas, Supreme Court Building, P. 0. Box 12248, Austin, Texas 78711, and two (2) certified copies of each to the General Counsel of the State Bar of Texas, 201 Main Street, Suite 1150, Fort Worth, Texas 76102.

It is further ORDERED that this SUSPENSION shall be made a matter of public record and be published in the as well as a newspaper of general circulation in the county Respondent's residence or office.

Signed this 28th day of August, 1997.

s/ George Thurmond
JUDGE PRESIDING

NO, 41,132 385th Judicial District Court, Midland County Texas
COMMISSION FOR LAWYER DISCIPLINE
v.
ALLEN R HAWKINS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the request of the Respondent, Allen R. Hawkins, the Court hereby makes the following findings of fact and conclusions of law in this cause.

FINDINGS OF FACT

1. Respondent Allen R. Hawkins, a practicing attorney at law of the Midland County, Texas, Bar, who limited his practice to the fields of taxation, probate and trusts, was appointed by County Court at Law Judge James Fitz-Gerald, 111, to represent an indigent defendant, Daniel Wayne Sundy, in a case in Judge Fitz-Gerald's court wherein the defendant was charged by information with possession of a quantity of marijuana, a Class B Misdemeanor Offense.

2. Respondent proceeded to inter-view his client the defendant Sundy, at the Midland County Jail, and Respondent learned that his client was HIV Positive and claimed to need and use marijuana to enable him to eat and take nourishment without becoming nauseated.

3. Respondent questioned whether he was competent to represent his client, and to adequately present the client's use of marijuana as either a defense to the charge or as a mitigating factor in his client's behalf in plea negotiations or at punishment hearing. Judge FitzGerald was so advised of Respondent's belief.

4. Judge Fitz-Gerald conducted a hearing, with Respondent in attendance, on the question of if Respondent could adequately represent his client, and concluded that the his representation,

5. Respondent refused to continue with his representation of the Defendant despite the Court's ordering him to do so, and such refusal was communicated by Respondent to his client, resulting in much worry and stress to his client.

6. Respondent failed to notify his client of scheduled court proceedings, causing his client to defend himself against a revocation of his ball when the defendant and Respondent failed to appear for a court proceeding.

CONCLUSIONS OF LAW

1. By his actions Respondent violated Rule 1.01(b) of the Texas Disciplinary Rules of Professional Conduct by neglect of a legal matter entrusted to him - the representation of his court-appointed client.

2. By his actions Respondent violated Rule 1.15(c) of the Texas Disciplinary Rules of Professional Conduct by not continuing with his representation of his court-appointed client when ordered to do so by the judge of the County Court-at-Law, notwithstanding Respondent had determned in his own mind, that he had good cause to terminate his representation.

3. By his actions Respondent violated Rule 1.15(d) of the Texas Disciplinary Rules of Professional Conduct by attempting to terminate his representation of his court-appointed client without taking steps to the extent reasonably practicable to protect his client's interests.

4, By his actions Respondent violated Rule 6.01 of the Texas Disciplinary Rules of Professional Conduct by seeking to avoid appointment by Judge Fitz-Gerald to represent the defendant after hearing was held and the Court found the Respondent was competent to adequately represent the Defendant, and that Respondent's continued representation of his client would not be in violation of law or the rules of professional conduct.

5, That Respondent, because of his actions, should be sanctioned by suspension from practice for one year, commencing September 1, 1997, to be followed by a three year period of probation, under the conditions set forth in the Judgment herein.

Signed on this 3rd day of November, 1997.
s/George M. Thurmond
Judge Presiding

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS
No. 08-97-00515-CV

ALLAN R. HAWKINS, Appellant

v.

THE COMMISSION FOR LAWYER DISCIPLINE, Appellee

Appeal from 385th District Court of Midland County, Texas

OPINION

This is an attorney discipline case. The appellant, Allan Hawkins, appeals from the trial court's order finding him in violation of several Rules of Professional Conduct and suspending him from the practice of law for one year followed by a three-year probated suspension. We reform the trial court's judgment and affirm as reformed.

FACTS

On August 8, 1994, Midland County Court at Law Judge James Fitz-Gerald issued an order appointing Hawkins to represent Daniel Wayne Sundy in a criminal matter. Sundy was charged with possession of marijuana, two ounces or less, a Class B misdemeanor. Sundy, who was infected with the HIV virus, claimed that his illness required him to use marijuana in order to digest food. Sundy had never previously been arrested. On August 29, 1994, Hawkins filed a "Motion for Appointment of an Effective and Competent Attorney." In the motion, Hawkins contended that he was not competent to practice

criminal law and therefore could not represent Sundy without violating Rules 1.01 and 6.01 of the Texas Disciplinary Rules of Professional Conduct. Despite his contentions of incompetence, Hawkins filed motions for speedy trial, jury trial, and to suppress evidence. Hawkins also filed a request for a court reporter and statement of facts, a motion for production of evidence for examination, and a motion for appointment of experts. On September 7, 1994, Hawkins attended a docket call on behalf of Sundy, and on September 12, he appeared for a scheduled trial date, which was continued.

Although he had claimed to be incompetent in his motion for appointment of competent counsel, Hawkins filed a "Motion for Payment of Fees to Charity in Lieu of Payment to Allan Hawkins" on September 12, 1994. In this motion, Hawkins noted that he had been required "to be in contact with Mr. Sundy and risk exposure to the HIV virus and death" and to "expend a great deal of time and effort to provide emergency representation" to Sundy, which, Hawkins maintained, caused "great inconvenience to Allan Hawkins and his other clients . . . ." Hawkins requested that $2,000 be paid to the Permian Basin Aids Coalition in honor of Sundy as payment for Hawkins' "emergency" representation of Sundy which was, in Hawkins' own words, "above and beyond the call of duty for an attorney and member of the bar of the State of Texas."

On September 20, 1994, the County Attorney offered Sundy a plea agreement, which included payment of a fine. Hawkins sent a copy of the written

offer to Sundy, but refused to discuss the merits of the offer with him or advise him whether to accept the agreement. Meanwhile, Hawkins told the prosecutor that Sundy did not have money and therefore could not accept the agreement. In response to the plea offer, Hawkins filed a second motion for appointment of effective counsel along with a brief outlining his incompetence to assist Sundy with the plea negotiations. Judge Fitz-Gerald held a hearing on the second motion. Evidence at the hearing established that Hawkins had served as an Assistant State's Attorney in North Dakota where he had also handled some criminal defense matters such as guilty pleas, traffic tickets, and game violations. He had handled appointed criminal matters in the Midland district courts along with co-counsel. Judge Fitz-Gerald found Hawkins competent to represent Sundy and issued an order requiring him to continue representing Sundy as appointed counsel.

Upon receiving Judge Fitz-Gerald's order, Hawkins sent a letter to Sundy, the text of which was:

> I am enclosing a copy of an order which I received today. Judge Fitz-Gerald has decided that you are not entitled to a lawyer. Judge Fitz-Gerald swore an oath to God and to man that he would uphold the *Constitution* and laws of the United States and Texas. He has decided that you are not entitled to a lawyer.
>
> Apparently you are only entitled to a lawyer if a cash pay-off is made. I will not make a cash pay-off to obtain judicial favoritism. I believe it is

a crime. Apparently that means that you don't get a lawyer. That is peculiar.

I must know even less about the *Constitution* than I thought. I thought the United States *Constitution* applies to you. I thought you are entitled to a lawyer under the *Constitution*. Although I am not permitted to represent you on the substance of this matter. I have done what I can do. I wish you well. (Emphasis in original).

Sundy, understandably confused, contacted Hawkins for an explanation. Hawkins was "very reluctant" to talk to Sundy, but told Sundy that he (Hawkins) was no longer his attorney and that Sundy should look for another lawyer. Sundy continued to call Hawkins a few times a month in an attempt to see what was happening in his case.

On January 6, 1995, Sundy's case was set for docket call. Although Hawkins admittedly received notice of the docket call, he did not attend nor did he notify Sundy of the setting. At the docket call, Sundy's case was set for a January 23, 1995 trial. Hawkins did not appear for trial, nor did he inform Sundy of the trial date. Sundy's failure to appear resulted in a proceeding to forfeit his bond. In response to a call from the district clerk's office concerning the possible revocation of Sundy's bond, Hawkins wrote to the court as follows:

Today my office received a call for Mr. Daniel Sundy. I do not represent Daniel Sundy. This is not news. The court knows it. The file in your office demonstrates that. I am not his courier. I

do not work for him. He does not work for me. He is not at this office. He is not at this telephone number.

If you wish to contact Mr. Sundy, do not call me or write me.

If you wish to contact Mr. Sundy, contact Mr. Sundy. Mr. Sundy is easy to contact. He responds to contacts. Mr. Sundy moved to Midland County so that he would be available when the court needed him. I will not act as an intermediary between the court and Mr. Sundy. I will not pass messages back and forth. If you have any message for him it is up to you to contact him.

On February 1, 1995, Sundy received notice that the court intended to revoke his bond. Sundy panicked and called the clerk's office. The clerk told Sundy that a warrant for his arrest had been issued and he should come to the courthouse to straighten the matter out. The clerk tried to reach Hawkins, but could not get him. Judge Alvin Walvoord later found Sundy in the courthouse foyer crying in "a very highly excitable state . . . very disturbed and agitated." Judge Walvoord learned that there was a problem with Sundy's bond, but because the judge was on recess from a trial, he could not assist Sundy. He found another judge who was available to hold a hearing for Sundy, and contacted the County Attorney. After a hearing at which Sundy apparently represented himself, Sundy's bond was reinstated. The day after the bond hearing, Hawkins wrote to the court as follows:

> I was out of office yesterday. Last evening I reviewed telephone messages and found a message from Fonda Love related to a hearing yesterday. As the Court knows, I do not represent Mr. Sundy.

After the February bond hearing, the trial court appointed new counsel for Sundy, and the matter was resolved quickly for a fine plus court costs, and Sundy's plea of guilty to possession of paraphernalia.

The Commission for Lawyer Discipline initiated a disciplinary preceding against Hawkins which was eventually tried in district court before Judge George M. Thurmond. The trial court found that Hawkins violated Texas Rules of Professional Conduct 1.01(b)(1), 1.15(c), and 1.15(d). Judge Thurmond assessed a one-year suspension from the practice of law followed by a three-year period of probated suspension against Hawkins. Hawkins appeals with forty-two points of error.

INTERPRETATION OF THE RULES

The majority of the relevant facts in this case are not disputed. What is hotly contested is the appropriate interpretation of the Rules of Professional Conduct in terms of Hawkins' behavior. In Points of Error One, Four, Five, Six, Fourteen, Fifteen, Eighteen, Nineteen, Twenty, Twenty-five, Twenty-six, and Thirty-seven, Hawkins contends that the trial court erred in finding that his conduct violated the Rules of Professional Conduct, and in finding that Rules 1.01(b)(1), 1.15(c), and 1.15(d) applied to him at all. Each of these points is dependent upon Hawkins'

interpretation of the Rules and his translation of the conduct the Rules required of him. The Commission, on the other hand, contends that the trial court correctly interpreted the Rules to find Hawkins' conduct in violation.

When considering the Rules, as when considering statutes, the appellate court should look to the entire Rule rather than to one phrase, clause, or sentence. One provision or part should not be given meaning or construction out of harmony or inconsistent with the other provisions.(1)

Accordingly, we will review the trial court's interpretation of the Rules as we would review the trial court's interpretation of statutes. Questions of statutory interpretation are questions of law that are not entitled to a presumption of validity.(2) We therefore review the trial court's interpretation of the Rules de novo.

According to Hawkins' interpretation of the Rules, Rule 1.01(a) required him to decline to represent Sundy. Rule 1.01(a) mandates

> (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:
>
> (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
>
> (2) the advice or assistance of the lawyer is reasonably required in an emergency and the

lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances. (3)

Hawkins maintains that Rule 1.01(a) required him to decline to represent Sundy despite his appointment and despite Judge Fitz-Gerald's order to continue the representation because the Rule places the determination of competence solely on the attorney. Accordingly, Hawkins argues, he had to defy the appointment and Judge Fitz-Gerald's order or be in violation of the Rules. Hawkins argues that Rule 3.04(d) further supports his actions. Rule 3.04(d) states that an attorney may not

> [K]nowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience. (4)

Since Hawkins professes to have held a good faith belief that he could not represent Sundy pursuant to Rule 1.01(a), he urges that no valid obligation for him to do so existed and he was forced to openly refuse to follow Judge Fitz-Gerald's order. Thus, Hawkins contends that his open refusal to acknowledge representation of Sundy even after Judge Fitz-Gerald's order insulates him from discipline under the Rules.

Hawkins fails, however, to consider other provisions of the Rules which belie his construction. It is important to recognize that different parts of the

Rules apply to different situations in which an attorney may find him or her self. Rule 1.01(a), the Rule Hawkins relies upon, is stated in general terms of "employment in a legal matter." (5) Another section of the Rules, however, is directed specifically at court appointments. Rule he heading "Public Service," states, in pertinent part, that

> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
>
> (a) representing the client is likely to result in violation of law or rules of professional conduct. (6)

A specific statutory provision ordinarily controls over a general one. (7) Accordingly, when an attorney obtains a representation by appointment, the attorney may not merely decline the representation as provided under the more general Rule 1.01(a), but must "seek to avoid" the appointment only for good cause pursuant to Rule 6.01. We find the phrase "seek to avoid appointment by a tribunal" implies a showing to the tribunal of good cause. In other words, the attorney may not simply decide that he or she is not competent to handle the appointed matter and decline or refuse the representation without the court's permission. We find Professors Sutton and Schwerk's comments on the operation of Rule 6.01 in appointment situations worth repeating here:

> Though generally a lawyer may freely reject any person's offer of professional employment, a different standard applies when

that offer emanates from a court.

> [A] lawyer may decline a representation that could not possibly be handled by the lawyer in a competent manner due to the matter's complexity, a representation wherein the lawyer is unfamiliar with the subject matter of the case, and where the lawyer has insufficient time to acquire the requisite degree of competence. Nevertheless, lawyers can abuse this exception by utilizing it when they presently lack the legal background and training necessary to competently handle a matter but they know they could remedy those defects through reasonable efforts. The ability to attain a law degree and a law license betokens a considerable ability to grasp legal issues. Thus, courts may expect that lawyers will make a good faith effort to utilize those abilities to acquire the requisite degree of competence before they invoke this exception, just as they would if they were approached about taking on an unfamiliar type of matter that they nonetheless believed would be rewarding.(8)

To an extent, Hawkins followed the mandate of Rule 6.01 by filing his motions for appointment of competent counsel and appearing before Judge Fitz-Gerald violate a Rule of Professional Conduct (Rule 1.01(a)) because the matter was beyond his competence.

But importantly, once Judge Fitz-Gerald ordered Hawkins to continue the representation, another Rule came into play. Rule 1.15(c) directs that "[w]hen ordered to do so by a tribunal, a lawyer shall continue

representation notwithstanding good cause for terminating the representation."(9) Hawkins' refusal to represent Sundy after he was ordered to do so by Judge Fitz-Gerald runs afoul of Rule 1.15(c). Further, Hawkins' use of Rule 3.04 to justify his refusal to act for Sundy even after Judge Fitz-Gerald's order is, like his reliance on Rule 1.01(a) rather than on Rule 6.01, a misapplication of a Rule germane to a set of circumstances different from his own. When read in isolation, Rule 3.04(d) seems to allow an attorney to defy any court order so long as it is done openly and is based on an assertion that no valid obligation exists. This appears to be precisely what Hawkins did.

Placed in context of the Rule as a whole, however, application of Rule 3.04(d) to Hawkins' situation becomes less than clear. Rule 3.04 is entitled "Fairness in Adjudicatory Proceedings." (10) The Rule speaks in terms of refraining from "obstruct[ing] another party's access to evidence," falsify[ing] evidence,"violating" established rule[s] of procedure or evidence," asking questions"intended to degrade a witness" or engaging in "conduct intended to disrupt the proceedings."(11) Thus, the Rule is aimed at fairness between the parties to a suit and fairness of the adversarial process. It is rulings within that process that fall under Rule 3.04(d). The appointment of counsel for an indigent criminal defendant is not a ruling that occurs within the adjudicatory proceeding itself.

Moreover, we find another application of the "specific versus general" rule in the interplay between Rules 3.04(d) and 1.15(c). Whereas Rule 3.04(d) refers

generally to any ruling of a court, Rule 1.15(c) is specifically directed to an order by the court to continue representation. Rule 1.15(c) forbids an attorney from discontinuing a representation in violation of a court order even if good cause for terminating the representation exists. Accordingly, we find that Rule 3.04(d) is inapplicable when the ruling in question is an order to continue representation. Instead, the more specific Rule 1.15(c) applies to such an order.

Additionally, Rule 1.15(c) serves to shield an attorney who holds an honest belief that he or she is incompetent to represent an appointed client from ethical repercussions resulting from the continued court ordered representation. By explicitly requiring the lawyer to accede to the tribunal's ruling to continue representation despite the lawyer's misgivings, Rule 1.15(c) protects the lawyer against a charge of wrongdoing. (12) Accordingly, Hawkins could have followed Rule 1.15(c), continued to represent Sundy, and been protected from any perceived ethical violations based on his alleged lack of criminal law skills without needing to rely on a refusal to represent Sundy under Rule 3.04(d).

We find that the trial court correctly interpreted the Rules of Professional Conduct. Accordingly, we overrule Hawkins' Points of Error One, Four, Five, Six, Fourteen, Fifteen, Eighteen, Nineteen, Twenty, Twenty-five, Twenty-six, and Thirty-seven.(13)

VAGUENESS

In his second and third points, Hawkins

contends that the trial court erred in failing to strictly construe the Rules in his favor, and erred in applying the Rules to him on the ground that the Rules are vague and ambiguous. At the outset, we note that disciplinary proceedings are civil in nature. (14) With the nature of the proceedings in mind, we turn to Hawkins' complaints of vagueness and failure to construe the Rules strictly. A statute, rule, regulation, or order is fatally vague only when it exposes a potential actor to some risk or detriment without giving fair warning of the nature of the proscribed conduct. (15) Prescribed standards that regulate the conduct of attorneys are subject to traditional tests for vagueness. (16) The traditional test for vagueness in regulatory prohibitions is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." (17) A regulatory prohibition must give fair notice and adequate warning to those whom it is directed. (18) In this case, the rules in question are directed to attorneys, a group whose members are specifically trained to consult applicable regulations and the writings of those empowered to interpret those regulations. (19)

We find that the Rules of Professional Conduct gave Hawkins fair and adequate notice of the conduct expected of him. Contrary to Hawkins' assertions, the Rules provide a clear distinction between the actions necessary to decline or withdraw from voluntary employment on the one hand and those necessary to decline or withdraw from appointed representations or

court ordered representations on the other. Hawkins cannot make that distinction less clear by simply insisting he failed to perceive it, nor can he claim lack of fair warning on that ground. To the contrary, we find that the ordinary person, or in this case, the ordinary attorney, exercising ordinary common sense could sufficiently understand and comply with the Rules. We therefore overrule Hawkins' second and third points.

SUFFICIENCY OF THE EVIDENCE: EXPERT TESTIMONY

In his seventh through tenth points, Hawkins contends that the evidence was insufficient to prove violations of Rules 1.01(b), 1.15(c), and 1.15(d) because the Commission failed to introduce expert testimony on the application of the Rules and the standard of care required. He cites Jatoi v. Decker, Jones, McMackin, Hall & Bates. (20) for the proposition that expert testimony on the standard of care is required in an attorney malpractice case. We find Jatoi inapplicable, however, because this is not an attorney malpractice case where the standard of care is at issue. Rather, this is a disciplinary proceeding where the appropriate interpretation of the Rules of Conduct and a factual determination of whether Hawkins' conduct met or violated the Rules is at issue. As we have already stated, interpretation of the Rules, like interpretation of statutes, is a matter of law for the court.(21) Accordingly, no expert testimony on the interpretation of the Rules was required. Moreover, no expert

testimony on the standard of care required in malpractice cases was required to aid the trial court as the trier of fact in determining whether Hawkins' actions violated the Rules as interpreted. Accordingly, we overrule Hawkins' seventh through tenth points.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his twelfth, seventeenth, twenty-second, and twenty-seventh points, Hawkins challenges the legal and factual sufficiency of the evidence to support the trial court's findings that he violated Rules 1.01(b), 1.15(c), and 1.15(d).

1. Standard of Review

In considering a legal sufficiency or "no evidence" point, an appellate court considers only the evidence which tends to support the jury's findings and disregards all evidence and inferences to the contrary.(22) If any probative evidence supports the jury's determination, it must be upheld. (23)

A factual sufficiency point requires examination of all of the evidence in determining whether the finding in question is so against the great weight and preponderance of the evidence as to be manifestly unjust.(24) The reviewing court cannot substitute its conclusions for those of the jury. If there is sufficient competent evidence of probative force to support the finding, it must be sustained.(25) It is not within the province of this court to interfere with the jury's resolution of conflicts in the evidence or to pass on the weight or credibility of the witness's testimony.(26) Where there is conflicting evidence, the jury's verdict

on such matters is generally regarded as conclusive.(27)

2. Applicable Law

The text of the relevant Rules is as follows:

1.01(b)

In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer . . .(28)

1.15(c)

When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.(29)

1.15(d)

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.(30)

3. Application of the Law to the Facts

We find ample evidence in the record to support the trial court's finding of violations of each of these Rules. With regard to Rule 1.01(b), the record reflects that Hawkins neglected Sundy's defense by failing to

advise Sundy when Sundy specifically requested advice, failing to appear for a docket call despite admittedly receiving notice of the setting, failing to appear for a potential trial date which would have been known to Hawkins had Hawkins appeared for the docket call, and failing to appear to defend Sundy on the revocation of his bond despite the trial court's telephone request to do so.

The record also displays more than sufficient evidence that Hawkins failed to continue representation of Sundy after Judge Fitz-Gerald's order in violation of Rule 1.15(c). It is undisputed that after a hearing on Hawkins' competence, Judge Fitz-Gerald ordered Hawkins to continue to represent Sundy. Instead, Hawkins wrote to Sundy and told Sundy that the judge had determined Sundy was not entitled to a lawyer to defend him. Hawkins refused to act on Sundy's behalf when appropriately noticed by the court and instead wrote letters to the court claiming that he did not represent Sundy and would not act as Sundy's "courier." Even after being ordered to continue as Sundy's counsel, Hawkins ignored docket call and thereby missed a potential trial date resulting in the threatened revocation of Sundy's bond.

Even under Hawkins' interpretation of the Rules, he failed to comply with Rule 1.15(d) after he allegedly "declined" to represent Sundy. Before new counsel was appointed for Sundy, Hawkins refused to advise Sundy when he requested advice, ignored the docket call and did not inform Sundy of it, missed a potential trial setting, and refused to defend Sundy against the

revocation of his bond. These omissions amply illustrate Hawkins' failure to take "steps to the extent reasonably practicable to protect a client's interests" as Rule 1.15(d) requires.

Hawkins did not contradict these facts at trial. Rather, Hawkins' evidence focused on the appropriateness of his actions under his own interpretation of the Rules. For example, Hawkins called several attorneys who testified that in their opinions, the Rules could be read to require Hawkins to act in the manner he did. As such, Hawkins' evidence does little, if anything, to contradict the facts supporting his violation of the Rules as appropriately interpreted. Accordingly, we overrule Hawkins' twelfth, seventeenth, twenty-second, and twenty-seventh points of error.

SUFFICIENCY OF THE EVIDENCE: SUNDY'S WORRY AND STRESS

In his twenty-first point of error, Hawkins challenges the sufficiency of the evidence to support the trial court's Finding of Fact Five that Hawkins' behavior resulted in "worry and stress" for Sundy. We disagree. Sundy testified, by deposition, that he "panicked" when he learned that a warrant had been issued for his arrest. Additionally, Judge Walvoord testified that he found Sundy in an agitated state, crying in the courthouse foyer. Accordingly, we find adequate evidence of Sundy's "worry and stress" to support the trial court's finding.

Hawkins also contends that there was no pleading to support a finding of "worry and stress."

We conclude no pleading was necessary, as the finding is relevant to the sanction phase of the proceeding in which the trial court must consider, among other things, the loss or damage to the client.(31) Because the Rule required the trial court to consider this element in determining a sanction, we find no pleading was necessary under the circumstances. Accordingly, we overrule Hawkins' twenty-first point.

FAILURE TO MAKE FINDINGS OF FACT

In his eleventh, thirteenth, and sixteenth points, Hawkins alleges that the trial court erred in coming to the legal conclusions that he violated Rules 1.01(b), 1.15(c), and 1.15(d) without making findings of fact as to any of the elements of each. We have reviewed Hawkins' Request for Additional and Amended Findings of Fact and Conclusions of Law and find that he failed to request the allegedly omitted findings. Findings may be presumed when (1) an element of the ground of recovery was included in the findings of fact; (2) the omitted element has not been properly requested; and (3) the omitted finding is supported by the evidence.(32) In this case, the trial court made a finding of fact supporting at least one element of each of the Rules Hawkins was found to have violated.

To reiterate, the relevant Rules require:

1.01(b)

In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer . . .(33)

1.15(c)

When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.(34)

1.15(d)

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.(35)

The trial court's Finding of Fact Six impliedly finds neglect of Sundy's case in that it states Hawkins "failed to notify his client of scheduled court proceedings . . . ." The same finding also satisfies, at the very least, the element of Rule 1.15(d) requiring that an attorney take reasonable steps to protect a client's interests even after termination of a representation. Finding Five satisfies, at the very least, an element of Rule 1.15(c) in that it states Hawkins "refused to continue with his representation of the Defendant despite the Court's ordering him to do so." As we have already discussed pursuant to Hawkins' twelfth, seventeenth, twenty-second, and twenty-seventh points, the evidence is sufficient to support any elements left unstated in the trial court's Findings of Fact. Accordingly, we overrule Hawkins' eleventh,

thirteenth, and sixteenth points of error.

SUFFICIENCY OF THE EVIDENCE: TRIAL DATE

Hawkins' twenty-third and twenty-fourth points of error attack the sufficiency of the evidence to support any implied finding that a firm trial date as opposed to a "potential trial date" was set in Sundy's case. Hawkins fails, however, to suggest the harm, if any, in an implied finding of a trial date in place of a finding of a "potential trial date." The evidence in this case clearly showed that Hawkins ignored a notice of docket call. At this docket call, the trial court set an additional hearing of some sort requiring Hawkins' and Sundy's presence. The evidence further shows that a warrant was issued for Sundy's arrest when neither he nor Hawkins appeared at the second hearing. Thus, Sundy was seriously prejudiced due to Hawkins intentional disregard of the first docket call. Under the circumstances, whether the second hearing was a firm trial date or a "potential trial date" is of little consequence. Accordingly, we do not find that an implied finding of an actual trial date was made by the trial court, nor was such an implied finding necessary to the trial court's judgment. We therefore overrule Hawkins' twenty-third and twenty-fourth points of error.

DUE PROCESS VIOLATIONS

In his twenty-eighth through thirty-second points, Hawkins contends that he was denied due process by the Commission's addition of alleged Rule violations in its petition to the district court which were not presented to an investigatory committee for a

finding of just cause. Hawkins does not identify which allegations were not made in the original complaint before the investigatory committee and they are not apparent from the record.

At his election, Hawkins' case was governed by Part III of the Rules of Disciplinary Procedure. As the Austin Court of Appeals held in Diaz v. Commission for Lawyer Discipline, (36)

> [T]he various provisions in Part III make it quite clear that district-court proceedings thereunder are original and independent proceedings. They are not proceedings in which the court is called upon to review an action taken in the administrative proceedings that were interrupted by the lawyer's removal of the case to district court. In such court proceedings, 'the Texas Rules of Civil Procedure apply' save as they may be varied by the Rules of Disciplinary Procedure. Tex. R. Disciplinary P. 3.08(b). In ordinary civil suits in district court, a plaintiff may join as independent claims 'as many claims . . . as he may have against an opposing party.' Tex. Rule Civ. P. 51(a). Nothing in the Rules of Disciplinary Procedure purports to vary Rule 51(a).(37)

We agree with the Austin Court's analysis. Any due process concerns Hawkins may have had were adequately addressed in the trial process according to the Rules of Civil Procedure. Hawkins was entitled to and received notice of the claims against him in the Commission's Original and Amended Disciplinary

Petitions. He was further entitled to and received a full trial on the claims against him as well as his defenses. Accordingly, we find no due process violations and we overrule Hawkins' twenty-eighth through thirty-second points.

NO PLEADING TO SUPPORT CONCLUSION FOUR

In his thirty-third point of error, Hawkins finds error in the trial court's making its Conclusion of Law Four, that Hawkins violated Rule 6.01 of the Rules of Professional Conduct, when there was no pleading to support the conclusion. The Commission concedes that it did not plead a violation of Rule 6.01. The Commission also argues that the conclusion is harmless because no mention of a violation of Rule 6.01 appears in the judgment. Hawkins has not pointed out any harm. Accordingly, we agree with the Commission and overrule Hawkins' thirty-third point.

DEFECTS IN THE UNDERLYING APPOINTMENT

In his thirty-fourth point, Hawkins maintains that his appointment to represent Sundy was fundamentally flawed. In this single point of error, Hawkins makes three different contentions. First, he alleges that the Midland Bar Plan under which he was initially appointed to represent Sundy created an unconstitutional "taking" of his services. Second, he contends that some lawyers are treated differently than others under the Plan thus violating principles of equal protection. Finally, Hawkins argues that under the Plan, he was appointed at random and not on the basis of merit as required by the Texas Code of Judicial Conduct.(38) We note that neither of the first two

contentions were raised to the trial court. Accordingly, they are waived. The constitutionality of a statute or rule will be considered only when the question is properly raised and a decision becomes necessary and appropriate to the disposal of the case.(39) Predicates for complaints on appeal must be preserved at the trial court level by motion, exception, objection, or some other vehicle.(40)

Moreover, the sanctions levied against Hawkins in this case do not rest solely on Hawkins' refusal to represent Sundy pursuant to his appointment under the Midland Bar Plan. In this case, Hawkins contested his duty to represent Sundy and was afforded a hearing on his concerns. The trial court found Hawkins competent to represent Sundy and ordered him to continue the representation. The hearing and the trial court's order remove Hawkins' appointment from one at random under the Midland Bar Plan to one specifically based on merit. Accordingly, we overrule Hawkins' thirty-fourth point.

SANCTIONS OUTSIDE THE COURT'S AUTHORITY

Hawkins alleges in his thirty-fifth point that the trial court had no authority to impose any sanction on him other than those delineated in Texas Rule of Disciplinary Procedure 1.06(T). The trial court's judgment suspended Hawkins from the practice of law for one year, and imposed a three-year probated suspension to be served after the year's suspension. The trial court further required Hawkins to comply with the following conditions during the term of probated suspension:

1. Respondent shall not violate any of the provisions of the Texas Disciplinary Rules of Professional Conduct nor any provisions of the State Bar Rules;

2. Respondent shall not violate the laws of the United States of any other state other than minor traffic violations;

3. Respondent shall maintain a current status regarding membership fees in accordance with Article III of the State Bar Rules;

4. Respondent shall comply with Minimum Continuing Legal Education (MCLE) requirements in accordance with Article III of the State Bar Rules;

5. Respondent shall comply with Interest on Lawyers Trust Account requirements in accordance with Article XI of the State Bar Rules;

6. Respondent shall comply with all requests for information forwarded to him by any grievance committee of the State Bar of Texas;

7. Respondent shall cooperate fully with the General Counsel's office in their efforts to monitor compliance with this order; and

8. Respondent shall provide fifteen (15) hours per month of pro bono services to indigent persons, as referred to him by the Midland County Bar Association, in need of wills, powers of attorney, and similar services and instruments within his field of expertise. Respondent shall

begin this service on September 1, 1998 and continue until August 31, 2000. Respondent shall send a report to the State Bar of Texas, 201 Main Street, Suite 1150, Fort Worth, Texas 76102, stating that he has complied with this condition of probation. The report is due to the State Bar of Texas Fort Worth office by the 15th of each month following the previous month.

Hawkins contends that the portion of the trial court's judgment requiring him to comply with the list of eight conditions is outside the bounds specified in Rule 1.06. We disagree. Our reading of the judgment reveals that the eight conditions are imposed as conditions of Hawkins' probated suspension. Rule 1.06(T)(5) allows the trial court to probate a suspension "upon such reasonable terms as are appropriate under the circumstances."(41) Thus, the imposition of the conditions is authorized by the Rule. We find that the conditions are appropriate and therefore overrule Hawkins' thirty-fifth point.(42)

ERROR IN SANCTION

In his thirty-sixth, thirty-eighth, and fortieth points, Hawkins contends that the trial court failed to consider the factors set out in Disciplinary Procedure Rule 3.10 when it considered and imposed sanctions on Hawkins. Rule 3.10 requires the trial court to consider the following twelve factors: nature and degree of the misconduct; seriousness of and circumstances surrounding the misconduct; loss or damage to clients; damage to the profession; assurance that those who seek legal services in the future will be insulated from

the type of misconduct found; profit to the attorney; avoidance of repetition; deterrent effect; maintenance of respect for the legal profession; conduct of Respondent during the course of the Committee action; trial of the case; other relevant evidence concerning the Respondent's personal and professional background.(43) We find that the trial court appropriately considered each of these factors in fashioning Hawkins' sanction in this case. The evidence showed that Hawkins intentionally disobeyed a court order to represent the indigent Sundy in spite of Rule 1.15(c) which clearly required him to do so. Worse, Hawkins wrote to Sundy after Judge Fitz-Gerald's order and told Sundy that Judge Fitz-Gerald had found Sundy was not entitled to an attorney. Although he clearly understood that he was under court order to represent Sundy, Hawkins ignored a docket call which led to further failures to appear and the eventual bond revocation hearing, which Hawkins also failed to attend despite telephone notice from the court. Hawkins wrote snide letters to the trial court in response to notice of hearings, while failing to even communicate the content of these notices to Sundy. The degree and seriousness of Hawkins' misconduct in a case where a gravely ill man's liberty was at stake profoundly and negatively impacted the profession and respect for the profession in the eyes of the public. The trial court correctly concluded that a serious sanction was needed to deter others from similar conduct.

Additionally, the Commission presented evidence that a serious sanction was needed to deter

Hawkins from repeating his conduct. Hawkins admitted that he had previously filed ten to twenty similar objections to appointments in criminal cases, and had filed recusal motions against almost every judge who had appointed him. At one of the recusal hearings, Hawkins subpoenaed the entire District Attorney's office, four judges, the County Judge, the County Attorney, and all of the County Commissioners. Moreover, the Commission presented evidence of Hawkins' behavior in the past. For example, Hawkins has twice been found in contempt for non-payment of child support. He has been sanctioned for filing groundless pleadings and committing acts in bad faith for purposes of harassment during a will contest case. During the underlying disciplinary proceeding, Hawkins filed a motion for sanctions against counsel for the State Bar and State Bar General Counsel. Hawkins alleged in the motion that the judiciary of Midland County was extorting bribes, yet he admitted that he had no evidence that any judge actually requested or took a bribe.

Although Hawkins presented six witnesses at trial, each a personal or professional acquaintance who testified that Hawkins was an impressive tax and probate attorney who cares about his profession, this evidence does little to contradict the evidence of serious misconduct in this case. Accordingly, we find that the trial court was within its discretion in balancing the evidence before it and applying the evidence in terms of the factors set out in Rule 3.10. We therefore overrule Hawkins' thirty-sixth, thirty-eighth, and fortieth

points of error.

FAILURE TO STAY SANCTION PENDING APPEAL

In his thirty-ninth point of error, Hawkins contends that the trial court erred in failing to allow him to continue to practice pending this appeal. Disciplinary Procedure Rule 3.14 provides that "a judgment of suspension shall be stayed during the pendency of any appeals therefrom, if the district court finds, upon competent evidence, that the Respondent's continued practice of law does not pose a continuing threat to the welfare of Respondent's clients or to the public."(44) We find, for the same reasons we overruled Hawkins' thirty-sixth, thirty-eighth, and fortieth points of error, that the trial court did not abuse its discretion in refusing to make a finding that Hawkins' continued practice would pose no continuing threat to the welfare of the public. Accordingly, we overrule Hawkins' thirty-ninth point.

JUDGMENT INCORRECTLY REFERS TO AGREEMENT

In his forty-first point, Hawkins contends that the trial court erred by stating in its judgment that the judgment was agreed. Indeed, the judgment refers to itself as an "Agreed Final Judgment." There is no evidence that Hawkins agreed to the judgment. The term appears to have been a drafting error. We find no harm to Hawkins that would require reversal, however, and he cites us to none. Accordingly, we sustain Hawkins' forty-first point of error and reform the judgment to delete any reference to an agreement or an agreed judgment.(45)

ATTORNEY'S FEES AWARD

In his forty-second point, Hawkins contends that the evidence is insufficient to support the trial court's award of $15,000 in attorney's fees to the Commission. We find, however, that the parties stipulated $15,000 was a reasonable and necessary fee for the litigation. Accordingly, we find the evidence sufficient to support the trial court's award and we overrule Hawkins' forty-second point.

CONCLUSION

Having considered and overruled each of Hawkins' points of error with the exception of Point of Error Forty-one, we reform the trial court's judgment to delete any reference to an agreement or an agreed judgment pursuant to our disposition of Point of Error Forty-one and we affirm the judgment as modified.

s/SUSAN LARSEN, Justice (Publish)

March 18, 1999

Before Panel No. 4 Barajas, C.J., Larsen, and McClure, JJ.

1. State Bar of Texas v. Wolfe, 801 S.W.2d 202, 203-04 (Tex. App.--Houston [1st Dist.] 1990, no writ).
2. See Hightower v. State Comm'r of Education, 778 S.W.2d 595, 597 (Tex. App.--Austin 1989, no writ).
3. Tex. Disciplinary R. Prof'l Conduct 1.01(a), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1998).
4. Tex. Disciplinary R. Prof'l Conduct 3.04(d).
5. Tex. Disciplinary R. Prof'l Conduct 1.01(a).
6. Tex. Disciplinary R. Prof'l Conduct 6.01(a).
7. Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 357 (Tex. 1992).
8. Robert P. Schwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Hous. L. Rev. 398-400 (1990).

9. Tex. Disciplinary R. Prof'l Conduct 1.15(c).
10. Tex. Disciplinary R. Prof'l Conduct 3.04.
11. Tex. Disciplinary R. Prof'l Conduct 3.04(a), (b), (c)(1), (c)(4), (c)(5).
12. See Robert P. Schwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Hous. L. Rev. 1, 219 (1990).
13. Hawkins also relies on a footnote in a case from this court, Perez v. State, 885 S.W.2d 568 (Tex. App.--El Paso 1994, no pet.). In Perez, as in this case, Hawkins had been appointed to represent an indigent criminal defendant and had filed similar motions for appointment of effective counsel. Id. at 569. Meanwhile, Perez hired other counsel to represent him. Id. Perez pleaded guilty pursuant to the advice of his retained counsel. Id. at 570. Hawkins nevertheless filed an appeal on behalf of Perez and argued his own ineffectiveness for failure to adequately advise Perez on his guilty plea. This court found, and noted in footnote five, that Hawkins' argument was incongruous with the facts of the case. Id. at 570 n.5. We intended nothing in footnote five, and find nothing in its language, to support any of Hawkins' assertions in this appeal.
14. State Bar of Texas v. Evans, 774 S.W.2d 656, 657 (Tex. 1989).
15. State Bar of Texas v. Tinning, 875 S.W.2d 403, 408 (Tex. App.--Corpus Christi 1994, writ denied).
16. Benton v. Commission of Lawyer Discipline, 933 S.W.2d 784, 787 (Tex. App.--Corpus Christi 1996, no writ).
17. Benton, 933 S.W.2d at 787 (quoting United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 579, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973)).
18. Grayned v. City of Rockford, 408 U.S. 104, 112, 92 S.Ct. 2294, 2301, 33 L.Ed.2d 222 (1972).
19. Tinning, 875 S.W.2d at 408.
20. 955 S.W.2d 430, 434 (Tex. App--Fort Worth 1997, writ denied).
21. See Hightower, 778 S.W.2d at 597.
22. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965); Worsham Steel Co. v. Arias, 831 S.W.2d 81, 83 (Tex. App.--El Paso 1992, no writ).

23. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 661-62 (1951); Neily v. Aaron, 724 S.W.2d 908, 913 (Tex. App.--Fort Worth 1987, no writ); see generally William Powers, Jr. & Jack Ratliff, Another Look at "No Evidence" and "Insufficient Evidence," 69 Tex. L. Rev. 515 (1991).
24. In re King's Estate, 244 S.W.2d at 660; Worsham Steel Co., 831 S.W.2d at 81.
25. Carrasco v. Goatcher, 623 S.W.2d 769, 772 (Tex. App.--El Paso 1981, no writ).
26. Reynolds v. Kessler, 669 S.W.2d 801, 807 (Tex. App.--El Paso 1984, no writ).
27. Oechsner v. Ameritrust Texas, N.A., 840 S.W.2d 131, 136 (Tex. App.--El Paso 1992, writ denied).
28. Tex. Disciplinary R. Prof'l Conduct 1.01(b)(1).
29. Tex. Disciplinary R. Prof'l Conduct 1.15(c).
30. Tex. Disciplinary R. Prof'l Conduct 1.15(d).
31. Tex. R. Disciplinary P. 3.10(C), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A-1 (Vernon 1998).
32. Tex. R. Civ. P. 299; Tarrant County Water Control and Improvement Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 913 (Tex. 1993); Lindner v. Hill, 691 S.W.2d 590, 592 (Tex. 1985); American Nat'l Ins. Co. v. Paul, 927 S.W.2d 239, 245 (Tex. App.--Austin 1996, writ denied).
33. Tex. Disciplinary R. Prof'l Conduct 1.01(b)(1).
34. Tex. Disciplinary R. Prof'l Conduct 1.15(c).
35. Tex. Disciplinary R. Prof'l Conduct 1.15(d).
36. 953 S.W.2d 435, 437 (Tex. App.--Austin 1997, no pet.).
37. Id.
38. Hawkins does not provide a cite to the provision of the Code he claims the Plan violates.
39. Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807, 813 (1959); Allen v. Employers Cas. Co., 888 S.W.2d 219, 222 (Tex. App.--Amarillo 1994, no writ).
40. Tex. R. App. P. 33.1; PGP Gas Products, Inc. v. Fariss, 620 S.W.2d 559, 560 (Tex. 1981).
41. Tex. R. Disciplinary P. 1.06(T)(5).
42. Hawkins also complains that unspecified sanctions in the judgment prohibit him from practicing in federal court under a federal license, restrict him from engaging in lawful speech, and prohibit him from collecting fees earned prior to his suspension. We do not find any argument, authority, or

reference to the statement of facts in Hawkins' brief supporting these contentions. Accordingly, we have nothing to review. Tex. R. App. P. 38.1(h); Tacon Mechanical Contractors, Inc. v. Grant Sheet Metal, Inc., 889 S.W.2d 666, 671 (Tex. App.--Houston [14th Dist.] 1994, writ denied). Moreover, we have reviewed the judgment in an attempt to discern the source of Hawkins' complaints and we find nothing barring Hawkins from practice in federal court under a license from a state other than Texas, nothing offensive to the First Amendment, and nothing prohibiting Hawkins from collecting fees for work performed prior to his suspension.

43. Tex. R. Disciplinary P. 3.10.
44. Tex. R. Disciplinary P. 3.14.
45. See Tex. R. App. P. 43.2(b).

The Supreme Court of Texas

September 2, 1999

Re: Case number 99-0660
C ourt of Appeals Number
08-97-00515-CV

Allan Hawkins
v.
Commission for Lawyer Discipline

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by: s/ Tanya R. Hunter, Deputy Clerk

#66,911
County Court of Midland County, Texas

The State of Texas
v.
Daniel Wayne Sundy

Motion for Appointment of an Effective and Competent Attorney

Defendant shows the court the following

1. This court has determined that the defendant is indigent and is entitled to the appointment of an attorney.

2. An indigent defendant who is entitled to appointment of an attorney is entitled to an attorney who is competent and effective.

3. This court has appointed Allan Hawkins to represent the defendant.

4. Allan Hawkins is not able to provide effective representation. Allan Hawkins affidavit is attached and incorporated herein by reference. Allan Hawkins is prohibited from representing the defendant on the merits in this proceeding. See Rules 1.01 and 6.01 of the *Texas Disciplinary Rules of Professional Conduct.*

5. The defendant is not represented by effective counsel.

6. A judge is required to exercise the power of appointment on the basis of merit

> "A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of the services rendered." Code of Judicial Conduct Canon 3C(4)

Prayer

The defendant requests that this court appoint effective counsel for the defendant as required by law and by the Code of Judicial Conduct.

s/Allan Hawkins
Attorney for the Defendant for the limited purpose of seeking effective counsel
P 0. Box 551 Midland, Texas 79702
(915) 687-5005
State Bar No. 09245800

#66,911
County Court of Midland County, Texas

The State of Texas
v.
Daniel Wayne Sundy

Second Motion for Appointment of an Effective and Competent Attorney

Defendant shows the court the following

1. The State has made an offer to the defendant.

2. The defendant is entitled to an attorney to evaluate the offer and advise the defendant.

3. The defendant does not have counsel to advise him.

Prayer

The defendant requests that this court immediately appoint a competent and effective attomey to represent the defendant in this cause.

s/Allan Hawkins
Attorney for the Defendant for the limited purpose of seeking effective counsel
P 0. Box 551 Midland, Texas 79702
(915) 687-5005
State Bar No. 09245800

January 18. 1996

Deena Brodsqaard
State Bar of Texas
Office of the General Counsel
William Monroe Kerr

Re: Commission for Lawyer Discipline v. Allan R. Hawkins Cause No. 40,653 in the 238th Judicial District Court of Midland County, Texas

Dear Counsel:

The decision of the Court in the above cause is as follows:

1. With respect to the allegations in paragraphs VII and VIII of Petitioner's First Amended Disciplinary Petition, the Court finds for the Respondent. There was no showing that there was a finding of just cause for such allegations and no showing that the sanctions order which was the basis of the allegations ever became final. The Court believes that the Petitioner failed to meet the burden of proof required.

2. With respect to the allegations that Respondent entered into a contingent fee arrangement, the Court finds for the Respondent. It is the Court's finding that there was *no* contingent fee arrangement between Respondent and Mrs. Snodgrass.

Mr. Kerr is requested to draw an appropriate order.

Very Truly yours,
s/J. Blair Cherry, Jr.

No. 40, 653 in the District Court of
Midland County, Texas, 238th Judicial District

COMMISSION FOR LAWYER DICIPLINE
v.
ALLAN R. HAWKINS

JUDGMENT

On December11, 1995, the date and time set by the Court for hearing this case, the undersigned Judge, who was duly appointed by the Supreme Court of Texas, brought this case on to be heard by the provisions of Part III of the Texas Rules of Court under the Disciplinary Procedure pertaining to trials *de novo* in the district court, no jury having been demanded. Petitioner appeared through counsel of record and Respondent appeared in person and by his counsel of record. Whereupon, the Court proceeded to hear the evidence and argument of counsel and received the written briefs of the parties.

The Court finds that it has jurisdiction, that venue of the case is proper, and the Petitioner made no showing that there was a contingent fee arrangement between Respondent and Anease Elaine Volkmann Snodgrass and concludes that Respondent has not violated rule 1.04(d) of the Texas Disciplinary Rules of Professional Conduct, as urged by Petitioner in Paragraphs I through VI of its first Amended Disciplinary Petition filed in this case.

With regard to Petitioner's allegations contained in Paragraph VI and VIII set forth in Petitioner's First Amended Disciplinary Petition, the Court finds that Petitioner made no showing of any finding of just cause for the allegations contained in said Paragraphs VII and VIII, and made no showing that the sanctions ordered, which were the basis of the allegations, ever became final. Hence, the Court finds and concludes that Petitioner wholly failed to meet its burden of proof on the issues the subject of Paragraphs VII and VIII of Petitioner's First Amended Disciplinary Petition that pertained to sanctions allegedly imposed on Respondent by the 198th District Court. Accordingly,

It is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court that Respondent has committed no acts or omissions which constitute professional misconduct with respect to any of the matters alleged by, Petitioner; that Petitioner shall bear the costs of court.

DATED this 22nd day of February 1996.

s/BLAIR CHERRY, JR.
District Judge by Appointment of the
Supreme Court of Texas to Hear the Captioned Case

No. 40, 653 in the District Court of
Midland County, Texas, 238th Judicial District

COMMISSION FOR LAWYER DISCIPLINE
v.
ALLAN R. HAWKINS

FIRST AMENDED DISCIPLINARY PETITION

COMES NOW Petitioner, the Commission for Lawyer Discipline. a committee of the State Bar of Texas (hereinafter called "Petitioner"), complaining of Respondent, Allan R. Hawkins (hereinafter called "Respondent"), showing the Court:

I. Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Gov't. Code Ann. §81.001, et seq (Vernon 1988), the Texas Disciplinary Rules of Professional Conduct, and the Texas Rules of Disciplinary Procedure. The complaint which Forms the basis of' the Disciplinary Petition was filed after May 1, 1992.

II. Respondent is an attorney licensed to practice law in Texas and is a member of' the State Bar of' Texas. Respondent is a resident of and has his principal place of' practice in Midland County, Texas. Respondent has been served with citation.

III. In or around November 1990, Respondent was retained by Anease Elaine Volkmann Snodgrass

(hereinafter called snodgrass), to represent her in contesting the will of her uncle, Wm. F. Volkmann, For which an Application had been made to probate.

IV. In July 1991, Snodgrass' father, Walter G. Volkmann, died and Snodgrass was made trustee of the Walter G. Volkmann Irrevocable Trust. It was agreed between Respondent and Snodgrass that Respondent would represent her, in her capacity as Trustee of the Walter G. Volkmann Irrevocable Trust, in pursuing another contest of the Wm. F. Volkmann will,

V. When Respondent agreed to represent Snodgrass in either capacity. both individually and as Trustee of the Walter G. Volkmann Irrevocable Trust, It was agreed between tile parties that the representation would be on a contingent fee basis.

VI. At no time prior to or during his representation of Snodgrass, in either capacity, Respondent ever reduce to writing, or fully explain to Snodgrass, their contingency fee agreement or the method by which the fees were to be determined.

VI. In or around May 1991, Summary Judgment was granted against Snodgrass, dismissing all actions pursued by Snodgrass in contesting the Wm. F. Volkmann will. Subsequent to the dismissal of Snodgrass's case, Respondent continued filing numerous pleadings and motions contesting nearly every action taken by the temporary Administrators.

Such actions taken by Respondent were designed to unnecessarily confuse tile issues, delay the probate proceeding and prolong the dependent administration of the Wm. F. Volkmann estate in order to procure a sizable settlement for the benefit of' Snodgrass and himself. Respondent's challenges to the actions taken by the Temporary Administrators were made in bad faith, without reasonable cause, inquiry or justification which resulted in substantial monetary damage and harm to the Estate of Wm. F. Volkmann and his lawful beneficiaries.

As a result of' Respondent's actions described In paragraph VII, Respondent was sanctioned by the 198th Judicial District Court. Respondent appealed the imposition of' such sanctions to the Court of Appeals, Fourth Supreme Judicial District, which upheld the imposition of sanctions but remanded for reconsideration of-the amount

VIII. Such acts and/or omissions on the part of Respondent as are described in Paragraphs III,V, and VI hereinabove constitute conduct violative of Rules 1.03(b), 1.04(c), 1.04(d), 3.01 and 3.02 of' the Texas Disciplinary Rules of' Professional Conduct.

The complaint which forms the basis of the Cause of' Action hereinabove set forth was brought to the attention of the Office of the General Counsel of-the State Bar of' Texas by Anease Elaine Volkmann Snodgrass filinga complaint on or about May 20, 1994.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays for judgment that Respondent be disciplined as the facts shall warrant, and that the petitioner be awarded such other relief' to which entitled, including costs of Court and attorney's fees. Respectfully submitted,

James M. McCormack
General Counsel

Deena Brodsgaard
Assistant General Counsel

State Bar of Texas
Litigation -Dallas

News report from the Midland daily newspaper.

"In misdemeanor court, a defendant isn't granted a court-appointed attorney until the last few weeks before the trial, District Attorney Al Schorre said.

"Because there is not an indictment process in County Court at Law, defendants go through the process pretty much the same way one would in municipal court, Schorre said. Their involvement in pretrial hearings is basically to answer "guilty," "not guilty" or "no contest" at each hearing.

"But if a person pleads not guilty throughout a misdemeanor case, the subject of whether he or she can afford an attorney will eventually arise before a trial begins.

"If they claim they can't afford someone to represent them, the court asks the defendant to visit with several lawyers and try to negotiate a payment plan they could afford. If that doesn't work, the defendant is granted a court-appointed attorney, Schorre said.

"The average misdemeanor case is on hold for two years before it is tried, Schorre said. It has improved from the three-year wait defendants were experiencing right after the County Attorney's and District Attorney's offices merged two years ago, he said."

Midland Reporter Telegram, May 25, 1999.

D.A. probes judge's legal assignments

By JOE STINEBAKER © 1999 Houston Chronicle

The Harris County District Attorney's Office will look into reports that a local juvenile court judge assigned paying cases in his court to lawyers who had contributed to his recent re-election campaign.

District Attorney John B. Holmes Jr. said he had asked his office's public integrity division to look into reports that Judge Pat Shelton rewarded campaign contributors by assigning them cases from families who had not selected lawyers.

"Actually we had looked into it before," Holmes said. "If there's any truth to it, that's a crime. But I can tell you right now, we're not going to get there. I don't think we'll ever get there, quite frankly. But I don't think we can do nothing either."

Holmes said that because the accusations, which came primarily from a local lawyer, were of a "he said, she said" nature, it would be difficult to prove or disprove them.

The accusations against Shelton derived primarily from the way he appointed attorneys in some of the juvenile cases in his court from January until last month. Like other judges, Shelton assigns lawyers to represent poor clients with criminal cases in his court. But many families he described as "paycheck to paycheck working poor" do not qualify for free legal help but still cannot afford lawyers of their own. So Shelton said he began a program that would connect those families to attorneys waiting in his courtroom for

a flat fee, usually $150.

Shelton said he cancelled the program after many of those lawyers complained that they were being paid with checks that later bounced.

Some of the attorneys assigned cases by Shelton were contributors to the judge's 1998 re-election campaign, and one attorney said she was told by Shelton's court coordinator that she would not receive such appointments unless she made regular campaign contributions.

Shelton denied the accusations Wednesday and said the criticisms were similar to those that all judges get about assigning cases to lawyers who contribute to their campaigns -- a common practice, but one that is widely criticized as being ripe for political corruption.

Shelton said that of the 200 appointments made in his courtroom last year, only 40 went to campaign contributors.

"In my opinion, I think that speaks for itself," he said. "There is no *quid pro quo*." Houston Chronicle.com June 23, 1999